No. 06-989
Title: Hall Street Associates, L.L.C., Petitioner
v.
Mattel, Inc.
Docketed: January 19, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-35721)
Decision Date: August 1, 2006
Rehearing Denied: October 17, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 12 2007	Petition for a writ of certiorari filed. (Response due February 20, 2007)
Mar 7 2007	DISTRIBUTED for Conference of March 23, 2007.
Mar 12 2007	Response Requested . (Due April 11, 2007)
Apr 6 2007	Order extending time to file response to petition to and including April 25, 2007.
Apr 24 2007	Brief of respondent Mattel, Inc. in opposition filed.
May 4 2007	Reply brief from petitioner Hall Street Associates, L.L.C. filed. (Distributed)
May 8 2007	DISTRIBUTED for Conference of May 24, 2007.
May 29 2007	Petition GRANTED.
Jun 28 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 27, 2007.
Jul 27 2007	Statement of printing costs, pursuant to Rule 26 received.
Jul 27 2007	Joint appendix filed.
Jul 27 2007	Brief of petitioner Hall Street Associates, L.L.C. filed.
Jul 27 2007	Brief amicus curiae of CTIA - The Wireless Association filed.
Jul 27 2007	Brief amicus curiae of Pacific Legal Foundation filed.
Jul 27 2007	Brief amici curiae of New England Legal Foundation, et al. filed.
Aug 27 2007	The time within which to file respondent's brief on the merits is extended to and including September 14, 2007.
Aug 30 2007	SET FOR ARGUMENT Wednesday, November 7, 2007.
Sep 5 2007	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 10 2007	Record received from U.S.D.C. for District of Oregon. (1 box)
Sep 14 2007	Brief amicus curiae of American Arbitration Association filed.
Sep 14 2007	Brief amicus curiae of United States Council for International Business filed.
Sep 14 2007	Brief of respondent Mattel, Inc. filed.

Sep 20 2007	CIRCULATED.
Oct 18 2007	Reply of petitioner Hall Street Associates, L.L.C. filed. (Distributed)
Nov 7 2007	Argued. For petitioner: Carter G. Phillips, Washington, D.C. For respondent: Beth S. Brinkman, Washington, D.C.
Nov 16 2007	The parties are directed to file supplemental briefs addressing the following questions: (1) Does authority exist outside the Federal Arbitration Act (FAA) under which a party to litigation begun without reliance on the FAA may enforce a provision for judicial review of an arbitration award? (2) If such authority does exist, did the parties, in agreeing to arbitrate, rely in whole or part on that authority? (3) Has petitioner in the course of this litigation waived any reliance on authority outside the FAA for enforcing the judicial review provision of the parties' arbitration agreement? The briefs, not to exceed 6,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Tuesday, November 27, 2007. Reply briefs, not to exceed 3,000 words, may be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007.
Nov 27 2007	Supplemental brief of respondent Mattel, Inc. filed. (Distributed).
Nov 27 2007	Supplemental brief of petitioner Hall Street Associates, L.L.C. filed. (Distributed).
Dec 3 2007	Supplemental reply of respondent Mattel, Inc. filed. TBP

Supreme Court, U.S.
FILED

No. — 06-989 JAN 12 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Hall Street Associates, L.L.C., Plaintiff-Appellee, Petitioner on Review.

2. Mattel, Inc., Defendant-Appellant, Respondent on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation owning 10% or more of the stock of Petitioner Hall Street Associates, L.L.C.

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HALL STREET ASSOCIATES, L.L.C.,
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PETITION FOR A WRIT OF CERTIORARI

Hall Street Associates, L.L.C. ("Petitioner" or "Hall Street") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court in which the court vacated the arbitrator's initial arbitration award because of legal error is unreported. (App., *infra*, 39a-58a). The original opinion of the Ninth Circuit Court of Appeals in which the court reversed the district court's enforcement of the parties' "expanded judicial review" agreement and remanded so that the district court could apply the standard of review set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*,

is unreported. (App., *infra*, 114a-116a). The district court's opinion on remand in which the district court vacated the arbitration award based on the FAA standard of review is unreported. (App., *infra*, 117a-128a). The Ninth Circuit's most recent opinion reversing the district court is also unreported. (App., *infra*, 129a-134a).

JURISDICTION

The Ninth Circuit's most recent opinion was entered on August 1, 2006. The Ninth Circuit denied a timely petition for rehearing *en banc* on October 17, 2006. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FAA are set forth at App., *infra*, 1a-3a.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's refusal to enforce the clear and unambiguous terms of the parties' arbitration agreement, an agreement that was entered into with district court approval after the commencement of this litigation. The arbitration agreement expressly states that the district court shall vacate, modify or correct the arbitration award "where the arbitrator's conclusions of law are erroneous." (App., *infra*, 16a). Because of the Ninth Circuit's refusal to enforce the parties' agreement as written, Petitioner is saddled with an arbitration decision that dissenting Judge Susan Graber held was "completely irrational" (App., *infra*, 134a) and which the majority on the Ninth Circuit panel recognized contained "possible errors of law." (App., *infra*, 132a).

STATUTORY FRAMEWORK

Congress enacted the FAA for the "central purpose" of "ensur[ing] that private agreements to arbitrate are enforced

according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotations and citations omitted). Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of "any contract evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon any grounds that exist at law, or in equity for the revocation of any contract." 9 U.S.C. § 2. "The effect of this section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA as a whole "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate * * *." *Id.* at 26.

The FAA further provides that "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," the court, upon application by a party to confirm the award, "must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9. Section 10 sets forth several very narrow grounds upon which the court "may make an order vacating the award," while section 11 sets forth limited grounds upon which the court "may make an order modifying or correcting the award." 9 U.S.C. §§ 10, 11. The arbitration agreement in this case provides for judicial review beyond the review provided for under sections 10 and 11.

FACTUAL BACKGROUND

This case arose from a property lease between Petitioner Hall Street, the landlord, and Respondent Mattel, Inc. ("Mattel"), the tenant. The lease did not contain an agreement to arbitrate disputes and both parties therefore had the absolute right to have all claims arising under the lease resolved in court. The property that was subject to the lease

had been used for many years by both Mattel and its predecessors as a toy manufacturing facility. (App., *infra*, 18a).[1] It is undisputed that the well water on the property, which employees had used for many years for drinking and bathing, was contaminated by trichloroethylene ("TCE") in concentrations well in excess of federal limits. (App., *infra*, 26a-27a). It is also undisputed that Mattel and its predecessors failed to test the well water on the property for contaminates as they were required to do under the Oregon Drinking Water Quality Act ("ODWQA"), ORS 448.114 *et seq.* (App., *infra*, 26a, 52a, 81a).

On February 11, 2000, Hall Street filed suit in Oregon state court seeking injunctive relief, declaratory relief and damages. (2005 ER 004). Included amongst Its claims was a claim that Mattel was required to indemnify it from all actions by any parties relating to the condition of the property. (2005 ER 016). Mattel removed the case to the United States District Court for the District of Oregon, which possessed diversity jurisdiction under 28 U.S.C. § 1332. (2005 ER 002).

The parties proceeded to a court trial of one of the issues in the case, regarding Mattel's termination of the lease. After the district court decided that issue and after a subsequent unsuccessful attempt to settle the entire case through mediation, the parties informed the district court that they would seek the court's approval of an agreement to arbitrate the remaining issues, an agreement that allowed for *de novo* judicial review of the arbitrator's legal rulings. (2003 SER 148-49). This agreement for expanded judicial review was central to the parties' agreement to arbitrate their dispute, a dispute which was not subject to a preexisting agreement to

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[1] Mattel's Excerpt of Record in the earlier 2003 appeal to the Ninth Circuit is cited as "2003 ER." Hall Street's Supplemental Excerpt of Record in the 2003 appeal is cited herein as "2003 SER." Mattel's Excerpt of Record in the 2005 appeal to the Ninth Circuit is cited as "2005 ER." Otherwise, all citations are to the Appendix.

arbitrate and which could have been properly litigated in federal court in the first instance. (2003 SER 153).[2] The agreement to arbitrate executed by the parties stated that the district court retained authority to review the arbitrator's factual findings for substantial evidence and to review the arbitrator's legal conclusions for legal error. (App., *infra*, 16a).

Relying on the Ninth Circuit's decision in *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), which upheld expanded judicial review of arbitration awards, the district court approved the parties' agreement to arbitrate with *de novo* review of legal issues in the district court.[3] (App., *infra*, 8a, 46a). The case proceeded to arbitration under this judicially approved arbitration agreement.

In early January of 2002, the arbitrator issued his Findings of Fact and Conclusions of Law. (App., *infra*, 17a to 38a). The arbitrator's initial decision was based on his legal conclusion that, despite the fact that Mattel had violated the ODWQA by failing over many years to test the water supply on the property for contaminants, it had not violated any "applicable" environmental laws. (App., *infra*, 35a). The arbitrator recognized (1) that the lease was negotiated in the context that Mattel's predecessor, View-Master, was "the only party with intimate knowledge of the property" and (2) that the lease therefore contained a broad indemnification

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[2] Hall Street's attorney, Jim Finn, executed an affidavit that was filed in the trial court stating as follows: "One of the *primary factors* of this arbitration agreement was that, unlike ordinary binding arbitration, the arbitrator's decision would be reviewable by Judge Jones, and then entered as a judgment of the Federal District Court, which would then be reviewed by the 9th Circuit Court of Appeals." (2003 SER 153) (emphasis added).

[3] Nearly two years after the district court approved the parties' expanded judicial review agreement in reliance on existing law, the Ninth Circuit reversed *LaPine* in *Kyocera v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), *cert dismissed*, 540 U.S. 1098 (2004).

clause that required Mattel to "indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease." (App., *infra*, 19a). The arbitrator further concluded that Mattel agreed to assume all liability for the presence of hazardous waste on the property under this "comprehensive" indemnification clause, irrespective of when the presence or use of the hazardous waste occurred. (App., *infra*, 35a). The arbitrator also recognized that the "only exception" to the indemnity obligation was if Mattel was in compliance with applicable environmental laws and did not directly or indirectly contribute to the presence or use of hazardous waste. (*Id.*).

Despite these findings, the arbitrator concluded that Mattel's admitted failure to test the well water on the property over the course of many years was not a violation of an "applicable" environmental law because the ODWQA was designed to protect human health and was "not designed to protect landowners from having their property protected from environmental contamination." (App., *infra*, 35a-36a). The arbitrator recognized that Mattel and its predecessors did not test the well water for a period of approximately 18 years but found that this failure "may constitute a violation of other laws, but does not constitute a violation of 'applicable environmental laws' regarding TCE." (*Id.*). Based on this conclusion, the arbitrator decided that Mattel was entitled to the contractual exception to the broad indemnification requirements of the lease.

Petitioner moved to vacate the arbitrator's award, seeking *de novo* review of the arbitrator's legal conclusion that Mattel's admitted violation of the ODWQA was not a violation of an "applicable environmental law" within the meaning of the lease. On April 29, 2002, the district court granted Hall Street's motion to vacate and remanded to the arbitrator for further consideration. (App., *infra*, 39a to 58a). The district court held, in agreement with the arbitrator's findings,

that Mattel and its predecessors had failed to test for TCE contamination on the property and that this failure constituted a violation of the ODWQA. (App., *infra*, 42a-43a, 53a-54a). The district judge also agreed with the arbitrator's legal conclusion that the lease was "written to impose broad liability on the tenant for any environmental damage on the property" and that the exceptions to this broad liability contained in the lease "freed the tenant from liability only if it was in compliance with all 'applicable environmental laws.'" (App., *infra*, 53a).

However, the district court ruled that the arbitrator's conclusion that the ODWQA was not an applicable environmental law was erroneous. (App., *infra*, 53a). The district court stated:

> The arbitrator's contrary reasoning – that Oregon's Drinking Water Quality Act ("ODWQA") does not constitute "applicable environmental laws" because "these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination" – is an overly restrictive construction of "applicable environmental laws that is not warranted by the language of the lease." (App., *infra*, 53a-54a).

The court disagreed with the arbitrator's conclusion that a law must protect property to be deemed an "environmental law" and stated that: "*No* environmental statute advances such a purpose; the *purpose* of such statutes is to protect the environment and human health." (App., *infra*, 54a-55a) (emphasis in original). The court further stated that the contention that the ODWQA was not an applicable environmental statute "defies logic." (App., *infra*, 55a).

On remand, the arbitrator entered an amended decision based upon the legally correct ruling that the ODWQA was an applicable environmental law which Mattel had violated.

(App., *infra*, 81a). Therefore, the exceptions contained in the lease to Mattel's broad indemnification responsibility did not apply. (*Id.*). Based on this conclusion, the arbitrator rendered a decision in favor of Hall Street in the amount of $583,971.60 and also awarded declaratory relief against Mattel for all future costs that Hall Street might be required to pay relating to the environmental cleanup of the property. (App., *infra*, 85a). The arbitrator then rendered a supplemental decision awarding attorney fees and costs. (2005 ER 138-141).

Both sides sought review of the arbitrator's amended decision by the district court. (App., *infra*, 87a). Other than with regard to Mattel's assertion that the arbitrator made a mistake in computing prejudgment interest, the district court upheld the arbitrator's amended award. (App. *infra*, 95a, 110a). On May 15, 2003, a district court judgment was entered incorporating both the trial court's initial decision regarding the lease termination issue (which had been tried before the court) and the arbitrator's amended award in favor of Hall Street. (App. *infra*, 111a-113a). The money judgment in Hall Street's favor was for $810,107.49 with six percent (6%) postjudgment interest. (App., *infra*, 112a to 113a).

Both sides appealed from certain aspects of that judgment. Mattel challenged the district court's enforcement of the parties' agreement that the arbitrator's conclusions of law could be reviewed *de novo*, arguing that the Ninth Circuit's intervening *en banc* decision in *Kyocera Corp.* had reversed *LaPine* and that the FAA did not permit judicial review of an arbitrator's decision beyond the standards of review allowed under the FAA. (Mattel's Opening Brief on Appeal, Ninth Circuit Case Nos. 03-35525 and 03-35526, pp. 12-13). Hall Street contended that *Kyocera* was distinguishable because, in that case, the parties' underlying contract contained an arbitration clause allowing for expanded judicial review while, in this case, the parties did not have an arbitration agreement when the lawsuit was instituted and agreed to the expanded

judicial review provision with district court approval after the case had been partially tried. (Hall Street's Combined Opening Brief and Answering Brief, Case Nos. 03-35525 and 03-35526, pp. 31 & n 5). Hall Street further argued that the *de novo* review provision was so inextricably intertwined with the agreement to arbitrate that it could not be severed and still give effect to the parties' intentions regarding arbitration. (*Id.* at 33 n 7).

On November 16, 2004, the Ninth Circuit reversed the district court's vacation of the arbitrator's initial erroneous award holding, without substantial comment, that "*Kyocera* compels us to vacate the district court's judgment based on the arbitration agreement and remand to the district court." (App., *infra*, 115a). The court further stated that, under *Kyocera*, "the terms of an arbitration agreement controlling the mode of judicial review are unenforceable and severable." (*Id.*). The Ninth Circuit remanded to the district court with instructions for the district court to confirm the arbitrator's initial award in favor of Mattel, "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." (App., *infra*, 116a).

On remand, the district court held that grounds for vacating the arbitrator's award existed under 9 U.S.C. § 10. (App., *infra*, 117a-128a). The district court held, in express reliance on the Ninth Circuit's decisions in *Theis Research Inc. v. Brown & Bain*, 386 F.3d 1180 (9th Cir. 2004), *amended on denial of rehearing*, 400 F.3d 659 (9th Cir. 2005), and *Employer's Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481 (9th Cir. 1991), that an arbitrator exceeds his or her powers within the meaning of 9 U.S.C. § 10 when the award is based on an "implausible interpretation of a contract." (App., *infra*, 124a). The district court, noting that neither party seriously disputed that the ODWQA

was an environmental law or that Mattel had violated it, reversed the arbitrator's initial conclusion that Mattel was in compliance with applicable environmental laws on the grounds that this conclusion was implausible. (App., *infra*, 125a-127a). The district court stated that nothing in the lease supported the arbitrator's conclusion that the phrase "applicable environmental laws" meant "anything other than its plain meaning, *i.e.*, the body of environmental law that generally applies to Mattel and with which Mattel's non-compliance could expose Mattel or Hall Street to civil or criminal penalties." (App., *infra*, 126a). The trial court again vacated the arbitration award, granted Hall Street additional attorney fees and costs and again entered judgment for Hall Street. (App., *infra*, 127a-128a).

Mattel again appealed to the Ninth Circuit. On August 1, 2006, a panel of the Ninth Circuit reversed and held that "[i]mplausibility is not a valid ground for voiding an arbitration award under either 9 U.S.C. §§ 10 or 11." (App., *infra*, 132a). The panel majority stated: "Although the arbitrator's assessment of the merits in this case contains possible errors of law, those errors are not a sufficient basis for a federal court to overrule an arbitration award." (*Id.*). Despite its finding regarding the presence of possible errors of law, the panel majority held that the arbitrator's decision was not "completely irrational," which it recognized as a valid (albeit unstated) basis for vacating an arbitration award under the FAA. (App. *infra*, 133a). The panel majority therefore remanded the case to the district with instructions to review the original award and declare Mattel the prevailing party. (*Id.*).

Judge Susan Graber dissented on the grounds that the arbitrator's award was "completely irrational." (*Id.*). She stated that "the only rational reading" of the term "applicable environmental laws" was "all federal, state, and local environmental laws and regulations" which Mattel was required

to comply with in its use of the premises. (*Id.*). Because it was undisputed that the ODWQA was an environmental law that Mattel violated, Judge Graber would have either upheld the district court under the "completely irrational" standard or remanded the case to the district court for reconsideration under that standard. (App., *infra*, 134a).

Petitioner sought *en banc* review of the Ninth Circuit's opinion. *En banc* review was denied by order of the Ninth Circuit on October 17, 2006. (App., *infra*, 138a). At all relevant times, the Ninth Circuit had jurisdiction over this case under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. There is a Wide, Irreconcilable and Deepening Split Between the Courts of Appeals Over Whether Parties May Agree to Non-statutory Grounds for Vacating an Arbitration Award, a Split which this Court Should Resolve by Granting Certiorari.

In this case, the Ninth Circuit has ruled, in strict reliance on its *en banc* decision in *Kyocera*, that parties to an arbitration agreement cannot agree to judicial review on grounds that expand on those provided for in sections 10 and 11 of the FAA. In *Kyocera*, the Ninth Circuit, reversing its earlier decision in *LaPine*, invalidated as contrary to the FAA the parties' agreement that an arbitration award should be vacated, modified, or corrected if legally erroneous or not supported by substantial evidence. The *Kyocera* court recognized that other circuits had enforced such "expanded judicial review" agreements based on this Court's decisions, including *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), which emphasized that the primary purpose of the FAA is to enforce the agreement of the parties according to its terms. *Kyocera*, 341 F.3d at 999. However, the Ninth Circuit reversed its prior decision in *LaPine* because of its policy judgment that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits

of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* at 998.

The Ninth Circuit's decision in *Kyocera*, as followed by the panel in this case, directly conflicts with the decisions of the First, Third, Fourth, Fifth and Sixth Circuits and is inconsistent with this Court's rulings that the primary purpose of the FAA is to give full effect to the parties' agreement to arbitrate as written. The FAA was intended to create a uniform federal substantive law of arbitration that preempts inconsistent state law. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone*, 460 U.S. at 24. As such, the FAA should not create conflicting outcomes with regards to the enforcement of arbitration agreements in different parts of the country. With the current and deepening split between the circuits on the validity of expanded judicial review under the FAA, many companies that do business on a nationwide basis are faced with such conflicting outcomes based simply on the circuit where the action to confirm or vacate an arbitration award is filed.[4] The widespread disagreement between the federal courts of appeals on an issue of such fundamental importance under a federal statute which has as its goal the creation of a uniform law of arbitration warrants review by this Court.[5]

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[4] Under the FAA, the proper venue for an action to confirm or vacate an arbitration award is the district agreed to by the parties in the arbitration agreement or, if there is none, where the award was made. 9 U.S.C. § 9. However, this Court has held that this venue provision is permissive, not mandatory, and that any venue allowable under the general venue statute for diversity actions, 28 U.S.C. § 1391, is proper. *Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000). This raises the specter of forum shopping by parties who will seek to further their chances of either confirming or vacating an arbitration award based on whether the district court sits in a circuit that permits or prohibits expanded judicial review.

[5] A party petitioning for a writ of certiorari is entitled to seek review of all interlocutory decisions preceding the entry of judgment, including

A. The Ninth Circuit's Decision Directly Conflicts with the Decisions of Five Other Circuits.

The Ninth Circuit's decision in reliance on *Kyocera* directly conflicts with decisions from the First, Third, Fourth, Fifth and Sixth Circuits.

In *LaPine*, the Ninth Circuit initially upheld the validity of expanded judicial review under the FAA and followed the decision of the Fifth Circuit in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995). *LaPine*, 130 F.3d at 889.[6] In *Gateway*, the parties' arbitration agreement stated that errors of law were subject to judicial review. *Id.* at 996. Recognizing that this provision expanded the extremely narrow standard of judicial review normally applicable under section 10 of the FAA, the Fifth Circuit held that "[s]uch a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract * * *." *Id.* The court in *Gateway* held that the FAA's standard of review provision was the "default standard of review" which would apply under a silent arbitration agreement but that "the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award." *Id.* at 997 n.3. The court, quoting *Volt*, 489 U.S. at 469, held that "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* The court reasoned that a refusal to enforce the parties' contractual expansion of the FAA's default standard of review "would be quite inimical to the FAA's purpose of

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rulings made in an earlier appeal. *See, e.g., Major League Baseball Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964); *Hamilton-Brown Shoe Co., v. Wolf Bros. & Co.*, 241 U.S. 251, 257-58 (1916).

[6] The Ninth Circuit in *LaPine* also based its holding on *Volt* and other decisions of this Court, which permitted parties to arbitrate under rules other than those established by the FAA. *LaPine*, 130 F.3d at 888.

ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 996 (quoting *Mastrobuono*, 514 U.S. at 57, quoting in turn *Volt*, 489 U.S. at 479). The holding of *Gateway* has been reaffirmed by the Fifth Circuit in subsequent cases. *See Harris v. Parker College of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592-93 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172 (2002).

In *Syncor Int'l Corp. v. McLeland*, 1997 U.S. App. LEXIS 21248 (4th Cir., August 11, 1997), *cert. denied*, 522 U.S. 1110 (1998), the Fourth Circuit followed *Gateway*.[7] In *Syncor*, the arbitration agreement, as in this case, allowed for *de novo* judicial review of legal issues. The court, applying *Gateway*'s reasoning that nothing in the FAA prohibits the parties from "providing contractually for an expanded judicial review of the award," engaged in *de novo* review of the arbitrator's decision. *Syncor*, 1997 U.S. App. LEXIS 21248 at *17.

The next circuit to follow *Gateway* was the Third Circuit. In *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir.), *cert denied*, 534 U.S. 1020 (2001), the court stated: "We now join with the great weight of authority and hold that parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own (including by referencing state law standards)." *Id.* at 293. The court ruled that, where the parties have language in the arbitration agreement evidencing their intent to opt out of the FAA's standard of review, "federal law requires that the court enforce the agreement." *Id.* at 292. While the court ultimately held that the arbitration agreement before it did not evidence such an intent, the

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[7] Although the *Syncor* opinion is unpublished, the Fourth Circuit's rules provide that an unpublished opinion issued prior to January 1, 2007, may be cited if the case has "precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." (4th Cir. Local R. 32.1). There is no published opinion from the Fourth Circuit on the issue cited.

holding of the court on the overarching legal issue is clear: An arbitration agreement which evidences a "clear intent to displace the FAA's default standards for judicial review" is enforceable. *Id.* at 295.

The Sixth Circuit has also ruled that parties may contract for expanded judicial review. In *Jacada, Ltd. v. Int'l Mktg. Strategies*, 401 F.3d 701 (6th Cir.), *cert. denied*, 126 S. Ct. 735 (2005), the court stated that "the central purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms" and proceeded to decide whether the judicial review provision of the FAA applied as opposed to the standard of review provision contained in the arbitration agreement. *Id.* at 709-10. Although the court ultimately held that the parties did not intend to displace the federal standard for vacatur under the contractual language used in their arbitration agreement, the court's decision is based upon the clear recognition that such displacement is not prohibited by the FAA. *Id.* at 711-12.

The latest circuit to rule that the FAA permits expanded judicial review is the First Circuit. In *Puerto Rico Telephone Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1785 (2006), the court was faced with a similar issue as in *Roadway* and *Jacada*, whether a generic choice-of-law provision was sufficient to establish the parties' intent to supplant the FAA standard of review of an arbitration award. The court stated that "[t]he issue whether parties by contract can supplant the FAA standard of review has generated substantial litigation." *Id.* at 30. After carefully analyzing *Gateway* and other cases supporting expanded judicial review as well as *Kyocera* and other cases opposing it, the court held: "We agree with the other circuits that have concluded that parties can by contract displace the FAA standard of review but that displacement can be achieved only by clear contractual language." *Id.* at 31. Where, as here, there is no question but that the parties used such clear language in their arbitration agreement, the court in

Puerto Rico Telephone would have certainly enforced the parties' expansion of the FAA's standard of review.

B. The Tenth Circuit, Along with the Ninth Circuit, Has Held that Expanded Judicial Review Undermines Public Policy Under the FAA.

Joining the Ninth Circuit in opposition to the First, Third, Fourth, Fifth and Sixth Circuits is the Tenth Circuit in *Bowen v. Amoco Pipeline, Inc.*, 254 F.3d 925 (10th Cir. 2001). In *Bowen*, the court held that the enforceability of the parties contractually "expanded standard" of judicial review "presents a difficult question." *Id.* at 933. Recognizing that its decision not to enforce such a contractual agreement conflicted with the law in the Fourth and Fifth Circuits, as well as the then-governing law in the Ninth Circuit as set forth in *LaPine*, the court, as in *Kyocera*, cited policy reasons for its holding. *Id.* at 933-35. While recognizing that arbitration even with expanded judicial review "reduces the burden on the courts," the court nonetheless found, on public policy grounds, that expanded judicial review "would threaten the independence of arbitration and weaken the distinction between arbitration and adjudication." *Id.* at 936 & n.6.[8] As stated earlier, *Bowen* and *Kyocera* directly conflict with the decisions of five other circuits.

C. Other Circuits Have Discussed the Issue of Expanded Judicial Review Without Definitive Holdings.

Three other circuits, the Second, Seventh and Eighth, have discussed the issue of expanded judicial review without definitive holdings. For example, in *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991), the Seventh Circuit, in a case involv-

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[8] The Ninth Circuit cited *Bowen* approvingly and adopted its public policy rationale in *Kyocera*. *Kyocera*, 341 F.3d at 999-1000.

ing an arbitration award under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, stated in dicta that "[a]n agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation," and the parties "cannot contract for a judicial review of that award because federal jurisdiction cannot be created by contract." *Id.* at 1505.[9] This case did not directly involve the FAA and is thus questionable precedent in cases involving that statute.

In *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003), the court noted the split in the circuits "on whether parties to an arbitration agreement can expand the scope of judicial review of arbitration awards." *Id.* at 788. Citing its prior decision in *UHC Mgt. Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), the court stated that the ability to contract for a heightened standard of review is "not yet a foregone conclusion" and expressed "grave skepticism" as to whether parties could do so consistent with the policies underlying the FAA. *Id.* at 789. However, the court chose not to expressly adopt the Tenth Circuit's holding in *Bowen* and instead resolved the case on the narrow ground that the arbitration agreement did not contain clear and unmistakable language establishing the intent to impose a heightened standard of judicial review. *Id.* at 789-90.

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[9] The notion that expanded judicial review creates federal jurisdiction "by contract" was also stated by the Ninth Circuit in *Kyocera*, which quoted *Chicago Typographical* to this effect. *Kyocera*, 341 F.3d at 999. However, as recognized by the First Circuit in *Puerto Rico Telephone*, this concern is "misplaced, as it is well settled that federal courts have jurisdiction over suits to compel arbitration (or to vacate or enforce arbitration awards) only if the parties are of diverse citizenship, or some separate grant of jurisdiction applies." *Puerto Rico Telephone*, 427 F.3d at 30-31. *See also Moses H. Cone*, 460 U.S. at 26 (the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction* * *").

The Second Circuit has similarly avoided the issue. In *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 63 (2d Cir. 2003), the arbitration agreement purported to "insulate the substance of the arbitration award from judicial review," even the very narrow review available under the FAA. The court acknowledged that, in those cases where courts "have enforced private agreements to alter the judicial review to be applied to arbitral awards, * * * the cases have involved attempts to raise the level of judicial review otherwise available under the FAA." *Id.* at 64. "While taking no position on the enforceability of agreements to raise the level of judicial review," the court noted "that there is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing the substance of an arbitration award at all." *Id.* The court declined to allow private litigants to completely divest the courts of authority to review both the substance of the arbitration award and the arbitration process under section 10 of the FAA. *Id.* at 66. However, the court expressly chose not to address the issue of heightened judicial scrutiny.[10]

D. The Conflict Between The Circuits Will Continue to Deepen Without this Court's Resolution of the Issue.

The substantial divide between the circuits is based on a fundamental, philosophical difference about the purposes of the FAA and is bound to deepen without resolution of the issue by this Court. As recognized by the First Circuit in *Puerto Rico Telephone*, those courts which have upheld expanded judicial review "have held that the Act's ultimate purpose is to enforce the terms of the agreement to arbitrate,

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[10] The court in *Kyocera* went the other route and stated that contracting for a narrower standard of review "may be less troublesome" than a broader, more searching, standard of review, such as is present here. *Kyocera*, 341 F.3d at 999 n.16.

and that they are therefore bound by federal law to enforce the arbitration agreements as drafted." *Puerto Rico Telephone*, 427 F.3d at 31. Those courts which have construed the FAA to preclude expanded judicial review have done so based "on the theory that allowing private parties to contract for more searching review standards would create federal jurisdiction by contract" and "on a public policy concern" that broad judicial review of arbitration decisions would jeopardize the benefits of arbitration. *Id.* at 30-31.

The circuit courts are thus in a square and irreconcilable conflict which is unlikely to resolve itself without guidance by this Court. The issue has gained the attention of several legal commentators, *See, e.g.*, Milana Koptsiovsky, *A Right to Contract for a Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 Conn. L. Rev. 609 (2004); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negotiation L. Rev. 171 (2003); Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 Pepp. Disp. Resol. L. Rev. 47 (2003).[11]

The issue can have important consequences in a particular case. For example, in *Kyocera* the arbitration award at issue was for approximately one quarter of a billion dollars. *Kyocera*, 341 F.3d at 990. The case at bar involves claims that exceed one million dollars. In very large cases, the

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[11] State courts are also in conflict on this issue. For instance, a Texas appellate court followed the Fifth Circuit rule and interpreted the FAA to permit the parties to expand the scope of judicial review. *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 250-51 (Tex. Ct. App. 2003). However, the California Court of Appeals in *Cable Connection, Inc. v. DIRECTV, Inc.*, 143 Cal. App. 4th 207, 223 (2006), following *Kyocera*, held that the FAA did not permit expanded judicial review. However, on December 20, 2006, the California Supreme Court granted review and depublished this decision. *Cable Connection, Inc. v. DIRECTV, Inc.*, 2006 Cal. Lexis 15057 (Cal. Dec. 20, 2006).

parties may not want to take the risk that an arbitrator will make a legal error, which is not correctable through judicial review. While these parties may very well have good reason to choose the flexibility, economy and speed which arbitration may offer with regards to the factual issues of the case, they may not be willing to give up the right to meaningful and searching judicial review on the controlling principles of law. The narrow default standards of the FAA simply do not meet their needs.[12]

Petitioner contends that parties should be free to contract for judicial review of an arbitration award beyond the limited scope of review set forth in the FAA. Parties that bargain for expanded judicial review do so with the expectations that the arbitration award will not be permeated with legal error. These contractual expectations should not be frustrated. Certainly, the question of whether such an agreement is enforceable should not depend solely on the circuit in which the arbitration award is issued, a situation which prevails because of the current split in the circuits.

II. The Ninth Circuit's Decision Is Fundamentally in Conflict with this Court's Cases Interpreting the FAA.

This Court has enforced in several cases contract terms that have called for arbitration under rules other than those established by the FAA itself. The Ninth Circuit's decision in this case is in direct conflict with these decisions.

For example, in *Volt*, the parties agreed that their arbitration agreement would be governed by California law. *Volt*, 489 U.S. at 470. California law permitted the trial court to stay an arbitration pending the outcome of other litigation.

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[12] In fact, the court in *Kyocera* stated that the issue of expanded judicial review was "of exceptional importance to future contracting parties and litigants within this circuit." *Kyocera*, 341 F.3d at 997 (emphasis added).

Id. at 471 n.3. Respondent argued that this provision conflicted with sections 3 and 4 of the FAA, which call for the direction of arbitration and a stay of the court proceeding pending arbitration, but which do not permit a stay of the arbitration itself. *Id.* at 476-77. *See also* 9 U.S.C. §§ 3, 4.

The Court rejected this argument in clear and forceful terms:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration. But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 478-79 (citations and quotations omitted).

Similarly, in *Mastrobuono*, the parties' arbitration agreement contained a provision stating that New York law applied. *Mastrobuono*, 514 U.S. at 53. Because New York courts had decided that the power to award punitive damages was limited to judicial tribunals and could not be exercised by arbitrators, the Court was faced with the issue of "whether a contractual choice–of–law provision may preclude an arbitral award of punitive damages that otherwise would be proper." *Id.* at 55. Although the Court ultimately held that the parties did not intend to foreclose an arbitral award of punitive damages, the decision clearly supports the parties' freedom to

contract for such an exclusion if they so desired. In this regard, the Court, citing *Volt*, made the familiar statement that the "central purpose" of the FAA was to ensure that private agreements to arbitrate are enforced according to their terms. *Id.* at 53. Holding that "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties," the Court was prepared to enforce the parties' agreement whether it included or excluded punitive damages. *Id.* at 57-58.

Similarly, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court again gave free reign to the parties to structure their arbitration agreement as they saw fit, even if the agreement altered the role of the reviewing court as prescribed by the FAA. In *First Options*, the Court permitted the parties to an arbitration agreement to alter the role of the reviewing court as prescribed in the FAA and to allow the arbitrator to determine, in the first instance, whether the dispute was arbitral. Under the FAA, the determination as to whether a dispute is arbitrable is reserved for the court. For example, section 3 of the FAA states that the court in any proceeding brought upon any issue referable to arbitration shall stay the action until such arbitration has been held in accordance with the terms of the arbitration agreement if the court "is satisfied that the issue in such suit or proceeding is referable to arbitration." 9 U.S.C. § 3. Section 4 states that, in the event that a party to an arbitration agreement fails to proceed to arbitration, the court shall make an order directing the parties to proceed "in accordance with the terms of the agreement." 9 U.S.C. § 4. The normal rule is thus that the court, not the arbitrator, decides arbitrability. *See, e.g., Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 82 (2002).

However, in *First Options*, this Court permitted the parties to alter the traditional role of the court by private agreement. The Court held that the question of "who has the primary power to decide arbitrability turns upon what the parties

agreed about *that* matter." *Id.* at 943 (emphasis in original). The Court's conclusion that the parties could decide the issue flowed "inexorably from the fact that arbitration is simply a matter of contract between the parties * * *." *Id.*

In this case, the Ninth Circuit held that *Kyocera* compelled reversal because the trial court had engaged in *de novo* review of the arbitrator's decision (according to the express terms of the parties' agreement) and had gone beyond the FAA standard of review. However, the reasoning behind *Kyocera*'s holding is contrary to this Court's precedents.

For example, the *Kyocera* rule as applied by the Ninth Circuit in this case gives short shrift to the oft-repeated holding of this Court that the "central purpose" of the FAA is to give effect to the parties' contractual agreement to arbitrate.[13] Rather, the court in *Kyocera* cited to modern views of arbitration, views which extol its supposed speed, economy and informality. *Kyocera*, 341 F.3d at 998.

Elevating these claimed benefits of arbitration over the central purpose of the FAA is contrary to this Court's precedents. As stated in *Volt*, while "Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost by a congressional desire to enforce agreements to which parties had entered.'" *Volt*, 489 U.S. at 477 (citing *Byrd*, 470 U.S. at 220). In *Byrd*, this Court expressly held that efficiency and speedy resolution of claims is not the main concern of the

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[13] This Court's holding that the central purpose of the FAA is to give effect to the parties' agreement is also supported by the FAA's legislative history. *See, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Nowhere does the legislative history assert that an agreement to arbitrate must be enforced only in accordance with the FAA or that a court is precluded from enforcing a contract on its own terms if the contract expands on the FAA's terms. Koptsiovsky, *A Right to Contract for a Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 Conn. L. Rev. at 614-15.

FAA and that it would not overlook what it viewed to be the principal objective of the FAA – specific enforcement of arbitration agreements – in favor of a mere "efficient" dispute resolution. *Id.* at 219-20.[14] Similarly, in *First Options*, this Court held that "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," but rather to ensure that arbitration agreements, like other contracts, are enforced according to their terms. *First Options*, 514 U.S. at 947.

As stated earlier, the Ninth Circuit's decision in *Kyocera* was also based on its assumption that expanded judicial review allowed the parties to define the jurisdiction of the district court by contract and/or that the parties were attempting to dictate how the court functioned. *Kyocera*, 341 F.3d at 999. However, this concern is misplaced because the FAA does not create an independent ground for federal court jurisdiction. *Moses H. Cone*, 460 U.S. at 26. In this case, the district court had independent jurisdictional grounds to decide the case based on its diversity jurisdiction and had the power to decide all factual and legal issues in the case until the parties entered into an arbitration agreement after the case was partially decided. The expanded judicial review provision was specifically approved by the district court, which relied on the Ninth Circuit's decision in *LaPine*, which had held that such provisions were enforceable.

As to the Ninth Circuit's concern that allowing expanded judicial review permits the parties to dictate how the court functions, this Court's decisions support the rights of parties to agree to waive statutory and other rights, even if such waiver affects the conduct of the court's proceedings. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 200-01

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[14] The Court in *Byrd* held that the "preeminent concern of Congress in passing the Act was to enforce private agreements to arbitrate***." *Byrd*, 470 U.S. at 221.

(1995) (criminal defendant may waive evidentiary admissibility of plea negotiations); *Sac and Fox Indians of Miss. in Iowa v. Sac and Fox Indians of Miss. in Okl.*, 220 U.S. 481, 488-89 (1911) (waiver of evidentiary rule barring hearsay). It is thus clear that, "absent an affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 513 U.S. at 201.

In addition, courts have permitted parties to waive affirmative defenses that would normally bar the court from deciding the case on the merits. Thus, in *Photopaint Technologies., LLC v. Smartlens Corp.*, 335 F.3d 152, 160 (2d Cir. 2003), the court held that the parties could agree to waive the statute of limitations for confirming an arbitration award under Section 9 of the FAA. Absent the parties' stipulation, the court would have been directed by Congress pursuant to the terms of the FAA not to hear the dispute. *See also United States v. Wilson*, 26 F.3d 142, 154-56 (D.C. Cir. 1994) (discussing various cases which uphold agreements to waive statutes of limitations).

The Ninth Circuit's rule, enforced in this case, that parties cannot waive what would otherwise be their right to have an arbitration award judged under an extremely deferential standard of review is without support in this Court's cases. The rule reflects a judicial approach which applies subjective and varying public policy views over precedent and which affords greater weight to the supposed speed and efficiency of arbitration than to the rights of the parties to contract for the type of arbitration process which best suits their needs. *See Mezzanotto*, 513 U.S. at 207 (the Court criticized the Ninth Circuit for its reliance upon "public policy " to "override the presumption of waivability").

While the Ninth Circuit accepts that the FAA creates only a default standard which the parties can "contract around" for all purposes prior to the final arbitration award, its policy

views cause it to abandon that premise with regards to judicial review, despite the fact that there is nothing either in the text of the FAA or its legislative history to indicate that this was Congress' intent. *Kyocera*, 341 F.3d at 1000. In the face of clear and long-standing authority from this Court that the central purpose of the FAA is to give effect to the parties' agreement to arbitrate, the Ninth Circuit's avoidance of that purpose when it comes to judicial review (and that of the Tenth Circuit as set forth in *Bowen*) is without support and is based solely on the court's views of the public policy benefits of arbitration.

In this case, the parties had the right to have their dispute decided by the district court, which clearly possessed jurisdiction over the case. They sought to conserve their own resources, and that of the district court, by agreeing to try the remaining issues in the case before an arbitrator. However, the central premise of their agreement to arbitrate was that the district court would retain the authority to correct errors of law. Neither side bargained for an arbitration award which contained such errors. Their agreement to arbitrate with expanded judicial review was expressly approved by the district court in reliance on the Ninth Circuit's prior holding in *LaPine*, which approved expanded judicial review under the FAA. The arbitrator's initial decision contained a fundamental error of law, which was corrected by the district court in accordance with the parties' agreement and resulted in a final award in favor of Hall Street.

The Ninth Circuit's reliance on *Kyocera* in this case has the practical effect of reinstating an arbitral ruling on an issue of law which Judge Graber of the Ninth Circuit held was "completely irrational" and which the panel majority recognized might very well be erroneous. The parties' reasonable expectations as set forth in their agreement to arbitrate are thus being directly frustrated, to Hall Street's great disadvantage. However, if the arbitration award had been issued in Boston,

Philadelphia, New Orleans or a myriad of other locations throughout the First, Third, Fourth, Fifth and/or Sixth Circuits, Hall Street would be the prevailing party, not Mattel.

The central purpose of the FAA is to enforce agreements to arbitrate according to their express terms. The holdings of the Ninth and Tenth Circuits undermine this purpose while the holdings of the First, Third, Fourth, Fifth and Sixth Circuits follow this Court's precedents and give controlling weight to this principal purpose of the FAA.

The FAA was also intended to create a uniform federal substantive law of arbitration. The current deep split in the circuits concerning the important issue of expanded judicial review under the FAA frustrates this important statutory purpose as well. This Court should accept review to resolve this important issue of statutory construction under the FAA.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

9 USCS § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USCS § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [9 USCS §§ 10, 11]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law

for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 USCS § 10.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the

use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 USCS § 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed OCT 23, 2001]

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

STIPULATION AND [PROPOSED] ORDER
REGARDING AGREEMENT TO ARBITRATE

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Attorneys for Defendant Mattel, Inc.

The parties, through the signatures of their counsel on this Stipulation, hereby agree to the following:

1. The parties in Case No. 00-355-JO, plaintiff Hall Street Associates, L.L.C., and defendant Mattel, Inc., agree to arbitrate before one arbitrator all remaining issues not decided previously in this case by the Court, the Honorable Robert E. Jones presiding. The arbitrator shall prepare written findings of fact and conclusions of law that may be reviewed by Judge Jones at the request of either party, as more fully described in paragraph 27 of the Rules attached as Exhibit A hereto.

2. All parties agree that the remaining issues in this case are set forth in the pleadings and referenced in the pretrial order and are as follows:

A. Whether the repairs and maintenance that Mattel performed prior to May 31, 2001 satisfied its repair and maintenance obligations under the Lease? If not, what additional repairs and maintenance are required and at what cost?

B. Whether the payments that Mattel has made to Hall Street in connection with litigation brought by third parties satisfied its indemnity obligation under the Lease? If not, what amounts does it owe for:

(1) The *Christopherson* case;

(2) The *Schiffer, Phelps and Keith* cases.

C. Whether Hall Street suffered a loss, and, if so, whether Mattel has any obligation under the Lease to compensate Hall Street for:

(1) Remediation of shallow soil contamination located under the buildings, including the film processing building and injection molding buildings, including remediation of the soil and damage to and loss of use of the buildings themselves, in excess of the amount reflected in the estimate

for this work that Mattel has previously offered to pay to Hall Street;

(2) Expenses incurred by Hall Street in relation to the Oregon Department of Environmental Quality ("DEQ") proceeding relating to the deep aquifer contamination by TCE, including any amounts Hall Street may be required to pay to DEQ;

(3) Damages, if any, to Hall Street's use or right to withdraw water from under the property.

(4) Expenses incurred by Hall Street for environmental consulting services performed by Dames & Moore in connection with environmental issues on the property.

(5) Expenses incurred by Hall Street for legal services rendered by Short, Cressman in connection with environmental issues on the property.

(6) Expenses incurred by Hall Street in pursuing claims against its own insurers regarding all of the above.

D. Which party is deemed to be the "prevailing party" in this litigation and what amount is it entitled to receive from the other under paragraph 24 of the Lease for the attorney's fees and costs it incurred as a result of this litigation?

3. The arbitrator shall decide the arbitration on or before December 30, 2001, and issue written findings of fact and conclusions of law. Any request for review of the arbitrator's decision will be made by motion to Judge Jones and filed within 15 days of the arbitrator's ruling.

4. The arbitration will leave in place all issues already decided by Judge Jones, including the orders dated December 11, 2000 and May 21, 2001.

5. The parties agree to schedule the arbitration to begin on December 12, 2001, to continue until completed to the

arbitrator's satisfaction. The parties agree that there will be no formal discovery. The parties will exchange expert reports prior to the arbitration, and limit the expert testimony to the opinions contained in those reports as provide by the Federal Rules of Civil Procedure.

6. The parties agree that they will in good faith work together to select an arbitrator, who shall be selected on or before November 1, 2001.

7. The parties agree to extend the Protective Order entered by the Court on April 4, 2001 to cover all matters in the arbitration, including the arbitrator's written findings of fact and conclusion of law.

8. The parties will conduct the arbitration according to the rules attached hereto as Exhibit A.

9. The parties agree that this agreement will bind both parties, and waive any challenge they may have to the procedures set forth in this Agreement.

10. The parties agree that they have both fully participated in the drafting of this Agreement, are represented by counsel, and have negotiated this Agreement at arm's-length, and therefore there will be no presumption that ambiguities, if any, in this Agreement be interpreted against the drafter.

11. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original agreement, but all of which shall be considered one instrument and shall become a binding agreement when one or more counterparts have been signed by each of the parties and delivered to the other.

12. This Agreement constitutes the entire agreement among the parties to it, and supersedes any prior or contemporaneous understandings or agreement with respect to the issues addressed herein. It may be amended only by a written instrument executed by all of the parties.

IT IS SO STIPULATED AND AGREED.

Dated: 10/22/01.

MARC D. BLACKMAN
RANSOM BLACKMAN LLP

PETER HSIAO
SIEGMUND SHYU
MORRISON & FOERSTER, LLP

By: /s/ [Illegible]
MARC D. BLACKMAN, Esq.
Attorneys for Defendant Mattel, Inc.

Dated: 10/22/01.

JAMES M. FINN
DEBRA MALDONADO
SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ James M. Finn
JAMES M. FINN, Esq.
Attorneys for Plaintiff Hall Street Associates, L.L.C.

IT IS SO ORDERED

Dated: Oct. 23, 2001.

/s/ Robert E. Jones
HON. ROBERT E. JONES
U.S. District Court Judge

RULES FOR THE ARBITRATION BETWEEN HALL STREET ASSOCIATES, LLC AND MATTEL, INC.

1. **General**: The parties intend for this arbitration to be conducted, to the extent possible, according to the rules of the Federal Rules of Civil Procedure and Local Rules of the U.S. District Court for the District of Oregon. Where the following rules do not specifically address the issue, the parties agree that the Federal Rules of Civil Procedure will be given the most persuasive weight in the arbitrator's decision on how to resolve the issue.

2. **Service and Filing**.

   A. **Service and Filing: How Made**. All papers will be served and filed by fax and mail on all counsel of record pursuant to Fed. R. Civ. P. 5(b).

3. **Hearing Site**. The arbitration hearing shall begin on December 12, 2001 and be held at the arbitrator's office, or a site to be selected by the arbitrator in Portland, Oregon.

4. **Appointment of Arbitrator**. The arbitrator shall be identified to the Court by November 1, 2001.

5. **Conduct and Role of Arbitrator**. In the arbitration proceeding, an arbitrator shall be bound by the same ethical considerations as that of a judge and will adhere to the conduct prescribed by the Code of Judicial Conduct. After the appointment of the arbitrator, the arbitration proceeding thereafter shall be conducted by the arbitrator.

6. **Restrictions on Communication Between Arbitrator and Parties**. No disclosure of any offers or settlement made by any party shall be made to the arbitrator prior to the announcement of the award. Neither counsel nor any party may communicate with the arbitrator re-

garding the merits of the case except in the presence of, or upon reasonable notice to, all other parties. An application or discussion for a postponement or other such peripheral matters may be communicated directly with the arbitrator when warranted by necessity and time constraints, but only after unsuccessful attempts to communicate through the secretary of the arbitrator and after unsuccessful attempts to discuss the matter via conference call among all concerned.

7. **Compensation of Arbitrator**.

A. **Statement of Time Expended And Expenses**. An arbitrator shall serve a detailed Statement of Time Expended on each party within fourteen days after the award or supplemental award or any earlier termination of the arbitration by settlement or otherwise, accompanied by any refund due to each party who paid the compensation deposit. The Statement of Time Expended shall itemize the dates, task performed, and time spent by the arbitrator on the arbitration, or shall indicate the minimum fee charge, and shall also list expenses reimbursable. The parties shall each pay one half of the arbitrator's fees and expenses.

8. **Postponements**. A hearing date may be postponed only upon just and sufficient cause by the arbitrator, or upon the application of any party to the arbitrator (whose decision shall be final), or by the agreement of the parties.

9. **Issues to be Presented**. The parties agree that the issues to be decided in the arbitration are set forth in the Stipulation and Order Regarding Agreement to Arbitrate, as signed by Judge Jones.

10. **Discovery**. There will be no discovery.

11. **Exchange of Proof**. At least fourteen days prior to the date of the arbitration hearing, each party shall file with the arbitrator and serve upon all other parties a statement containing a list of witnesses whom the party intends to call at the arbitration hearing, a list of exhibits and documentary evidence. The statement shall contain a narrative statement of the matters about which each witness will be called to testify, which will serve as the witnesses' direct testimony, the address and telephone number of each such witness and affiant, and whether the Witness will testify by telephone. At least seven days prior to the arbitration hearing, each party shall file and serve upon all other parties its exhibits and other documentary evidence, including its expert report, and a "trial brief" for the mediation.

Plaintiff shall designate its experts and serve on the other party the reports required by Fed. R. Civ. P. 26(a)(2)(B) not later than November 2, 2001. Defendant shall designate experts to be called by defendant and serve on the other party the reports required by Fed. R. Civ. P. 26(a)(2)(B) not later than November 30, 2001. Plaintiff shall not be permitted to add any new rebuttal expert, but may serve on the other party rebuttal expert reports not later than December 6, 2001. The rebuttal report will be limited to respond only to matters raised in one of defendant's expert reports, and shall not introduce or address any issue not raised in defendants' report. The mediator will also take into account the fact that defendant is not filing rebuttal reports under this schedule, and allow appropriate rebuttal testimony from defendant's experts at the arbitration hearing. All experts will be limited to testify at trial to the matters identified in their report.

A party failing to comply with the rules delineated in this paragraph may not present at the hearing a witness,

exhibit or documentary evidence required to be disclosed or made available, except with the permission of the arbitrator.

12. **Conduct of Hearing**.

A. **Procedure** The arbitrator shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

1. Make the interrogation and presentation effective for the ascertainment of the facts.

2. Protect witnesses from harassment or undue embarrassment.

B. **Oaths and Evidence**. The arbitration shall be conducted under the Federal Rules of Evidence. A witness shall be placed under oath or affirmation by the arbitrator prior to presenting testimony. If the hearing room has a speaker phone, a witness may testify by telephone, unless the arbitrator finds that this method would be unfair. The arbitrator may question any witness.

C. **Recording**. The hearing shall be recorded by stenographer or electronically by the arbitrator.

D. **Stipulation to Evidence**. The parties should stipulate to the admission of evidence where there is no genuine issue as to its relevancy or authenticity.

E. **Privacy**. Unless otherwise specifically provided by law, the hearing and all proceedings herein shall be private. All matters in the arbitration, including but not limited to any testimony, documents, findings of fact, conclusions of law, or transcript of the proceedings, shall be kept confidential under the terms of the Protective Order entered by the U.S. District Court in this matter on April 4, 2001.

F. **Exhibit/Witness List**. The arbitrator shall make a record of the names and addresses of the witnesses, and the exhibits offered and received into evidence.

13. **Sanction for Failure to Comply with Arbitration Order**. The arbitrator shall have the authority to require a party, an attorney advising each party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure of such party or attorney, or both, to obey an order of the arbitrator.

14. **Subpoena and Contempt Power**. The arbitrator shall have the power granted in 9 USC Sec. 7 to compel the attendance of witnesses duly notified by either party and to enforce from either party the production of all books, papers and documents deemed material to the cause by the arbitrator. The arbitrator or a party shall have the right granted in 9 USC Sec. 7 to initiate contempt proceedings against any witness or party refusing to answer a subpoena or obey any lawful order of the arbitrator.

15. **Failure or Refusal of a Party to Participate; Prima Facie Hearing**. The failure, refusal, or inability of any party to participate in the arbitration process or to attend the hearing or any portion thereof, or a party's failure to obtain an adjournment or postponement of the hearing or any portion thereof after due notice thereof, shall not prevent the arbitration process from continuing or prevent the hearing from taking place as scheduled or prevent an award from being rendered. However, the arbitrator shall not render an award except upon evidence made at the hearing sufficient to support the award rendered.

16. **Adjournments**. Upon the request of any party and at the discretion of the arbitrator, the hearing maybe adjourned from time to time. The hearing shall be adjourned upon the joint request of all parties.

17. **Closing of Hearing**. After each party has stated that it has no further evidence to present, the arbitrator shall declare the hearing closed and may thereupon, at the discretion of the arbitrator, hear oral arguments of the parties.

18. **Reopening of Hearing**. A hearing may be reopened prior to the rendering of the award upon the motion of the arbitrator or by the arbitrator upon the application of any party if, in the discretion of the arbitrator, it appears just and proper to do so.

19. **When Decision Due**. The arbitrator shall render a written decision promptly and shall make every reasonable effort to render the award within fourteen days from the close of the hearing.

20. **Scope of the Decision**. The arbitrator shall prepare written findings of fact and conclusions of law.

21. **Form of Decision and Delivery**. The decision shall be in writing and signed by the arbitrator. A signed original of the award shall be served upon each party by fax on the date it is signed, and by regular mail.

22. **Costs and Attorney's Fees**.

A. **Procedure**. If the arbitrator decides that the Lease requires the payment of attorney's fees and costs to either side, the arbitrator shall require the prevailing party to submit a statement containing a detailed, itemized list of such fees and costs sought in compliance with the Federal Rules of Civil Procedure and the Local Rules of the U.S. District Court for the District of Oregon. The arbitrator shall provide the non prevailing party an opportunity to submit a written objection, also in compliance with the Federal Rules and Local Rules as stated above. The arbitrator will set a schedule for the submission of these items, and issue

a supplemental decision without farther hearing (unless requested by the arbitrator) that contains findings of fact and conclusions of law sufficient to support any such payment. The award shall specifically state the award in a dollar amount,, and provide that payment is to be made in 30 days from the date of decision. The supplemental decision shall be issued within 21 days of the decision issued pursuant to Paragraph 19 above,, following the same form and procedure for the entry of that decision, and shall be limited to the issue of costs and attorney's fees.

23. **Correcting an Award**.

A. **Purpose**. A decision or supplemental decision may be amended by the arbitrator to correct an inadvertent miscalculation, description, designation, etc., or a typographical error or misplaced decimal point. An amended award shall not change any decision on its merits.

24. **Confirmation of Award by Judgment**. The parties will submit the decision and supplemental decision to U.S. District Court for the District of Oregon (U.S. District Judge Robert E, Jones, presiding) within thirty (30) days after the issuance of the decision, for the confirmation of the decision as a judgment of such court. Either party may request that the Court set a briefing schedule for review or modification of the decision. Any Court review of the arbitrator's decision shall be as set forth in paragraph 27 below.

25. **Return of Exhibits**. The exhibits and any recording of the proceeding will be submitted upon request of either party to the U.S. District Court for its review. If these materials are not requested by the Court, the arbitrator may request that the parties stipulate to the release and/or destruction of these materials.

26. **Modification of Rules by Stipulation**. The parties may by stipulation modify any of these rules.

27. **Judicial Review of Arbitrator's Findings of Fact and Conclusions of Law**. The arbitrator shall decide the matters submitted based upon the evidence presented and the applicable law. The arbitrator shall issue a written decision which shall state the basis of the decision and include specific findings of fact and conclusions of law. The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

28. **No Contesting of Arbitration Rules**. The parties agree that no party shall contest in any court of law the arbitration rules set forth herein as contrary to any law, regulation, rule, or guideline.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

ARBITRATOR'S FINDINGS OF FACT AND
CONCLUSION OF LAW

FINDINGS OF FACT

1. Plaintiff Hall Street Associates, L.L.C. ("Hall Street") is a Washington limited liability company and is the owner of certain property in Washington County, Oregon, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "Property"). Cascade Square Associates ("Cascade") is the sole principal of Hall Street and its predecessor-in-interest.

2. Defendant Mattel, Inc. ("Mattel") is a Delaware corporation doing business in Oregon. Its "predecessors-in-interest," as that term is commonly understood, but without regard to the "Lease" referred to below, are View-Master International Group, Inc., and View-Master Ideal Group (collectively "View-Master"); and Tyco Industries, Inc., Tyco Manufacturing Corporation, and Tyco Toys, Inc. ("collectively "Tyco").

History of the Property

3. The Property was once a part of a larger, 50-acre L-shaped property. The larger property consisted of three distinct parcels, known as Parcels 1, 2, and 3.

4. From 1951 to 1967, Sawyers, Inc. ("Sawyers") owned Parcels 1, 2, and 3, and operated a toy manufacturing facility.

5. In 1967, GAF acquired Sawyers and continued operations at the site.

6. In 1979, GAP sold Parcel 3 to the Southern Pacific Industrial Development Company.

7. In 1981, GAF sold Parcels 1 and 2 to View-Master.

8. View-Master owned and operated Parcels 1 and 2 from approximately 1981 to 1983.

9. In 1983, View-Master sold Parcels 1 and 2 to Western International Properties (also known as Western Industrial Properties), but leased back Parcel 1 to continue its manufacturing activities.

10. In 1984, Western International Properties subdivided Parcel 1, with the northwest corner sold to Commercial Real Estate Company, which redeveloped it as an office building. The remaining portion of Parcel 1 (the "Property") was sold to John Eyler in 1984. Mr. Eyler subsequently conveyed Parcel 1 to Cascade in 1985.

11. In 1989, Tyco acquired the assets of View-Master, which remained a subsidiary of Tyco.

12. In 1997, Mattel acquired Tyco.

13. In 1998, Cascade transferred its ownership interest in the Property to Hall Street.

14. On May 31, 2000, Mattel sent Hall Street a Notice of Termination informing Hall Street that it was terminating the lease effective May 31, 2001, almost two years prior to the scheduled lease termination date in 2003. At an earlier stage

of this litigation, Hall Street alleged that Mattel's early termination of the lease term was not permitted under the terms of the lease. Judge Jones bifurcated that issue from the issues in this arbitration and, after a two-day bench trial, concluded that Mattel's termination did not violate the agreement. Accordingly, Mattel's early termination of the lease is not an issue in this arbitration.

15. The Lease terminated and Mattel vacated the Property on May 31, 2001. Except for remediation efforts, the Property remains unoccupied.

The Lease

16. On March 5, 1991, View-Master entered into a Lease Agreement with Cascade for the Property (the "Lease"). On April 26, 1996, Cascade and View-Master executed a First Amendment to the Lease, which, among other items, extended the term of the Lease.

17. The Lease was negotiated by Robert Hibbs, an attorney and partner of Cascade, for the Landlord, and Dennis Wesolowski and Michael Kennedy, attorneys for View-Master. Both parties participated in drafting certain portions of the Lease.

18. The Lease was negotiated in the context that View-Master was the only party with intimate knowledge of the property and would, therefore, indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease of June 1, 1985, with limited exceptions.

19. The Lease replaced the Original Lease dated June 1, 1985, which had provided in Section 6.3 as follows:

> **"Tenant shall indemnify and defend Landlord from any claim, loss, or liability arising out of or related** to any action or inaction of Tenant, its employees, agents or invitees or **any condition of the Property."** (Emphasis added.)

20. The recitals to the Lease provide as follows:

> **"B. View-Master designed and constructed the Premises as a toy manufacturing facility at a time when it owned the underlying real property. View-Master has been the only party to occupy or conduct business on the Premises. View-Master continued to lease the Premises front Landlord pursuant to the Original Lease which provided that View-Master Indemnified Landlord for** its actions with respect to the Premises or **any condition of the Premises. The parties intended that such Indemnity applied to** Tenant's actions in constructing the Premises, including its choice of building materials, and **all activities with respect to the Premises whether or not they occurred before the date of the Original Lease**.
>
> **C. In Executing this Lease, the parties intend that Tenant shall assume View-Master's obligation to indemnify Landlord under the Original Lease, which indemnity obligation shall survive termination of the Original Lease, and intend that Tenant shall indemnify Landlord for any actual or potential liability Landlord may be exposed to as a result of Tenant's future actions with respect to the Premises. Because the Premises are a self-contained manufacturing facility constructed and previously owned by View-Master, and because the Original Lease was on a triple net basis, Landlord has not been actively involved in managing the Premises and relied on View-Master's agreement to indemnify Landlord for Its actions."** (Emphasis added.)

21. In addition, the Lease contains the following relevant sections:

a. Section 5(b) provides, in pertinent part:

> **"Tenant shall comply at its expense with all applicable laws, rules and regulations of any public**

authority, including but not limited to those regarding maintenance, **operation, and use of the Premises**, use of machinery and signs on the Premises, **and those regarding discharging hazardous materials** or any other waste." (Emphasis added.)

b. Section 5(c) provides, in pertinent part:

"Tenant shall not conduct or permit any activities on the Premises that create a nuisance or damage the reputation of the Premises or Landlord's adjoining property, or are reasonably offensive to Landlord, or other owners or users of adjoining property."

c. Section 8(a) provides:

"Maintenance of the Premises. **Tenant will, at its sole cost and expense, maintain the Premises and make repairs to the Premises, including without** limitation the heating, ventilating, air conditioning, mechanical, electrical, elevator, and plumbing systems, **structural roof, walls, and foundations**, the fixtures and appurtenances to the Premises, other improvements, sidewalks and parking areas **as and when required or requested by any governmental agency or when needed to preserve them in good repair, operating condition, working order and good appearances, and regardless of whether the repairs are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital, or the fault or not the fault of Tenant, its agents, employees, invitees, visitors, or contractors. All such repairs will be in quality and class equal to the original work or installations."** (Emphasis added.)

d. Section 12(a) provides, in pertinent part:

"Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises, including but not limited to the Resource

Conservation and Recovery Act, as amended (RCRA), and the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA). . . . Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release [of hazardous wastes] whether occurring before the Lease Commencement Date, or during the Lease term." (Emphasis added.)

e. Section 12(b) provides:

"Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees **of hazardous substances** as herein defined **on the Premises**. Tenant shall immediately notify Landlord in writing of any release of hazardous waste. In addition, **Tenant assumes liability for the use or presence** in the Building materials or **on or about the Premises of any hazardous waste** including but not limited to asbestos or lead. **Tenant assumes** all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and **defend Landlord, its officers, agents, and employees, against and from any and all losses, costs, damages, expenses (including environmental abatement costs) or liabilities directly or indirectly resulting or arising from any such release or presence or use or hazardous building materials.** Subject to the conditions of Section 12c, below, this provision shall continue in full force and effect regardless of whether this Lease is terminated pursuant to any other provision or the Premises are vacated by Tenant," (Emphasis added.)

f. Section 12(c) provides, in pertinent part:

"To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding

the foregoing language in Section 12.b. above, Tenant shall not be held liable following the expiration of this Lease term for the following: . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building." (Emphasis added.)

g. Section 12(d) provides:

"Hazardous waste, hazardous building materials or hazardous substances for the purposes of this Lease shall be defined to include, but shall not be limited to, the following: . . .

(b) Any substance defined as "hazardous substance," "hazardous material," or "toxic substance" in:

(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(2) the Hazardous Materials Transportation Act, as amended;

(3) the Resource Conservation and Recovery Act, as amended; and

(4) any similar federal, state, or local law or regulation now or hereafter in effect."

h. Section 13(a) provides:

> **"Indemnification. Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liability, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its** officers, contractors, licensee; agents, servants, employees, guests, invitees, **predecessors-in-interest,** or visitors **in or about the Building or Premises as a result of any act, omission or negligence of Tenant or its** officers, contractors, licensees, agents, servants, employees, guests, invitees, **predecessors in interest,** or visitors, **whether occurring** in the construction of or choice of building materials for the Building, **occurring during or prior to the Original Lease [or] during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant.**
>
> **In the event that Landlord is sued for failure to comply with local, state or federal environmental laws and/or regulations regarding the Premises,** and it is alleged the spill or violation occurred over a number of years, some portion of which time is outside of the term of this Lease or the Original Lease, then Landlord shall agree to seek to have the other tenants (whether prior or subsequent to the Lease or Original Lease) pay for their prorated amount of Landlord's defense costs in such suit. Tenant's obligation to defend shall not be delayed but shall be limited to its allocable portion of such defense costs. . . .
>
> **To the extent Tenant has been in compliance with applicable environmental laws,** notwithstanding the foregoing language in Section 13.a. above, Tenant shall not be held liable following the expiration of this Lease term for the following: . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc. . . .

(iv) Any other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc. . . .

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building." (Emphasis added.)

i. Section 20 provides, in pertinent part:

"[U]pon expiration of the term of this Lease, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises, together with all keys thereto, to Landlord in as good condition as when received by View-Master from Landlord under the Original Lease or as thereafter improved, reasonable use, wear and tear excepted."

j. Section 31 provides:

"The Premises and Landlord's adjoining property are both served by a drainage system which consists of open grates and underground sewers and catch basins. Tenant shall maintain in good condition and repair the portion of such system on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system.

k. Section 32 provides:

> "The Premises and Landlord's adjoining property are both served by one unified sanitary sewer system. Tenant shall be responsible for maintaining in good condition and repair the portion of such system located on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system."

19. During the negotiations, View-Master asked Cascade to remove the term "predecessors-in-interest" from Section 13a, fearing that the language would later be interpreted to include Sawyers and GAF. Cascade refused, but did agree to add other language to Section 13 limiting View-Master's liability if certain conditions were met. Despite that refusal, View-Master signed the Lease.

Environmental Issues at the Property

22. From approximately 1951 to 1980, GAF/Sawyers used trichloroethene ("TCE") to remove grease from metal parts. The degreasing operations occurred in a building on Parcel 2, where TCE contamination of the shallow groundwater is found today. GAF/Sawyers also disposed of sanitary wastes via a septic tank and drainfield located at the north end of Parcel 1, where shallow groundwater contamination is also found today. Spills of TCE by GAF/Sawyers occurred at the degreasing location and other areas. Drums of degreaser wastes were dumped on Parcel 3 by GAF/Sawyers. There is no evidence of TCE use at the facility after GAF sold the Property in 1981.

23. The well and water tower on Parcel 1 were installed in 1950. The on-site well supplied facility water.

24. During the period 1981-1998, View-Master, Tyco, and Mattel did not test the well water, groundwater, or shallow soils for contaminants.

25. In March 1998, during testing performed at the instance of Hall Street by SECOR, an environmental consultant, water from the well was discovered to contain TCE at levels far in excess of the federal maximum allowable level. Efforts were initiated under the auspices of the Oregon Department of Environmental Quality ("DEQ") to investigate the environmental contamination problem and plan remedial efforts. Those investigations revealed contamination of the Property and adjacent parcels by several types of contaminants, including TCE, petroleum hydrocarbons ("TPH"), cyanide, chromium and silver. The contamination was determined to exist not only in the on-site well, but also in the shallow soil, groundwater, and deep aquifer underlying the Property.

26. Mattel shut down the well upon discovery of the contamination. This shutdown is permanent and Hall Street has lost any water rights it had.

27. There is insufficient evidence to prove that Mattel's use of the well after 1981 circulated TCE and resulted in additional contamination of the shallow soil and groundwater.

28. There is insufficient evidence to prove that the condition of certain pipes after 1981 resulted in TCE leaks and additional contamination of the shallow soil and groundwater.

29. In November 1998, Mattel and GAF entered into a consent order with DEQ. GAF agreed to investigate the environmental conditions of the Property, and Mattel agreed to provide public outreach and communications to the employees. Interim cleanup actions to address areas of immediate concern were completed during the Summer of 2001.

30. As part of the site investigation, a risk assessment was performed under DEQ's direction to evaluate all contaminants at all areas. The risk assessment identified current and future risks at the site in two locations. First; unacceptable risk was identified from TCE in the deep aquifer if that source is to be used as drinking water. The risk assessment also identified possible impact to ecological receptors in the

wetland, if untreated water from the deep groundwater were ever to be pumped to the surface and discharged.

31. Second, unacceptable risk was identified from TCE in the shallow groundwater located at Parcel 2 in the location of spills from GAF/Sawyers at the degreasing machine area and at Parcel 1 in the GAF/Sawyers drainfield urea. This risk was limited to trench workers who may be exposed to shallow groundwater in those areas, should there be any excavation of those areas in the future. The shallow groundwater in all other areas of the Property have only low levels of TCE and other associated compounds present, and therefore no current or future remediation or special conditions are necessary.

32. Petroleum hydrocarbons were also identified in the soil located under Buildings 400 and 800/900 that were used by both GAF and View-Master for injection molding machines and boilers. Because the hydrocarbons capped by the building are immobile, and have low toxicity, DEQ has found that the hydrocarbons are posing no risk and is not requiring their remediation. However, if the buildings were ever removed, and the soil was subsequently disturbed, the hydrocarbons in the soil must, under DEQ's direction, be properly treated.

33. The contaminants in the soil in the remainder of Parcel 1 are below residential cleanup standards; therefore, no current or future remediation or special conditions are necessary as to the shallow soil.

34. The investigation and cleanup of contamination at the Property, to the extent required by DEQ, is being addressed by G-1 Holdings, the successor to GAF, under DEQ's supervision. On October 29, 2001, DEQ issued its Recommended Remedial Action Staff Report for the Property.

Repair Issues

35. In general, View-Master, Tyco, and Mattel failed to repair and maintain the Property as required by Section 8a prior to 2000.

36. In preparation for terminating the Lease and vacating the Property, Mattel engaged in an extensive program to assess and repair the facility.

37. Mattel offered to pay the Landlord the cost of repair, in lieu of performing them, if the Landlord intended to tear down the buildings to redevelop the Property. Hall Street refused.

38. Mattel provided a list of repairs to the Landlord before beginning work. Mattel kept Hall Street informed by providing regular status reports and providing Hall Street with the opportunity to inspect the work. Neither Hall Street nor Mortenson, Hall Street's consultant, responded to the letters, and neither visited the Property or criticized the work while it was performed.

39. The City of Beaverton inspected repairs on the roof and other building elements both before and after the work was completed, and approved all work performed. All of the materials used in the work performed were equal or better in quality and class to the original work.

40. Mattel expended more than one million dollars in repairs to the Hall Street facility in 2000. In its final inspections before returning the Property to the Landlord at the end of May 2001, Mattel determined that the structures were in good condition, that none of the roofs leaked, and that all of the mechanical, electrical, water and other equipment, pipes, fixtures, pavement and systems on the Property were in good working order.

41. Hall Street presented no evidence regarding the condition of the Property when View-Master began its lease:

Third Party Lawsuits

42. Hall Street and Cascade were sued by former employees of Tyco for their negligence as Landlord for the TCE Contamination. These cases are identified as the Keith,

Phelps, and Schiffer cases. Those cases were subsequently dismissed for lack of proof of any injury caused by any condition at the property.

43. Hall Street incurred expenses defending those claims and seeks indemnification from Mattel.

44. GAF, Hall Street, and Mattel were also sued by the daughter of a Tyco worker in the Christopherson case for personal injuries allegedly caused by TCE contamination at the Property. That case was subsequently dismissed for lack of proof of any injury caused by any condition at the property.

45. Schwabe, Williamson & Wyatt was the only counsel of record for Hall Street in the *Christopherson* cases, Mattel has paid for those attorneys' fees and costs.

46. In addition, Hall Street incurred defense costs from Short, Cressman & Burgess, the law, firm of Mr. Robert Hibbs, in defending the Christopherson case and seeks indemnification from Mattel.

47. The Court previously ruled that Hall Street's "conduct did not result in a waiver of the indemnity requirement" in the Christopherson case. The parties dispute whether this constituted a determination that Mattel was required to indemnify Hall Street for defense costs in Christopherson.

CONCLUSIONS OF LAW

1. The Arbitration Agreement between the parties defines the issues for decision in this Arbitration:

> (a) Whether the repairs and maintenance that Mattel performed prior to May 31, 2001 satisfied its repair and maintenance obligations under the Lease? If not, what additional repairs and maintenance are required and at what cost?

(b) Whether the payments Mattel made to Hall Street in connection with litigation brought by third parties satisfied its indemnity obligation under the lease? If not, what amounts does it owe for:

(1) The *Christopherson* case:

(2) The *Schiffer, Phelps*, and *Keith* cases.

(c) Whether Hall Street suffered a loss, and, if so, whether Mattel has any obligation under the Lease to compensate Hall Street for:

(1) Remediation of shallow soil contamination located under the buildings, including the film processing building and injection molding buildings, including remediation of the soil and damage to and loss of use of the buildings themselves, in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street;

(2) Expenses incurred by Hall Street in relation to the DEQ proceeding relating to the deep aquifer contamination by TCE, including any amounts Hall Street may be required to pay to DEQ;

(3) Damages, if any, to Hall Street's use or right to withdraw water from under the property;

(4) Expenses incurred by Hall Street for environmental consulting services performed by Dames & Moore in connection with environmental issues on the property;

(5) Expenses incurred by Hall Street for legal services rendered by Short, Cressman in connection with environmental issues on the property; and

(6) Expenses incurred by Hall Street in pursuing claims against its own insurers regarding all of the above.

(d) Which party is deemed to be the "prevailing party" in this litigation and what amount is it entitled to receive from the other under paragraph 24 of the Lease for the attorney's fees and costs it incurred as a result of this litigation?

2. Hall Street brings each of these claims against Mattel under the theory of breach of contract. That is, Hall Street alleges that Mattel breached the Lease. Under Oregon law, to maintain an action for breach of contract the plaintiff must establish (1) a valid contract between the parties, (2) a breach or failure without legal excuse to perform any promise that is a part of the contract, and (3) resulting damages to the plaintiff. 17A Am. Jur. 2d Contracts § 716 (1991); Reliable Credit Assoc. Inc. v. Credithrift of America, Inc., 570 P.2d 379, 381 (Or. 1977). For there to be a valid contract, the party bringing the action must be in compliance with the terms of the contract, and not in breach. 17A Am. Jur. 2d Contract § 716 (1991). Hall Street, as the plaintiff in this action, has the burden of proof to establish all requisite elements to maintain a breach of contract. Pickard v. Or. Senior Citizens, Inc., 395 P.2d 168, 170 (Or. 1964).

Lease Interpretation

3. Under Oregon law, the construction of a contract is a question of law for the court. *Anderson v. Divito*, 130 Or. App. 272, 277, 908 P.2d 315 (1995) (citing *Timberline Equip. Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 281 Or. 639, 643, 576 P.2d 1244 (1978)). The court's goal is to give effect to the intention of the contracting parties. *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575-76, 931 P.2d 763 (1997) (citing *Investment Serv. Co. v. Smither*, 276 Or. 837, 843, 556 P.2d 955 (1976) and O.R.S. 42.240 (in the construction of a written instrument the intention of the parties is to be pursued if possible)).

"To interpret a contractual provision . . . , the court follows three steps. First, the court examines the text of the disputed provision, in the context of the document as a whole." *Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997). "If the provision is clear, the analysis ends." *Id.*

> When considering a written contractual provision, the court's first inquiry is what the words of the contract say . . . . To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.

Id. (quoting *Eagle Indus., Inc. v. Thompson*, 321 Or. 398, 405, 900 P.2d 475 (1995).

A contract or tennis unambiguous if it has only one sensible and reasonable interpretation. *D & D Co. v. Kaufman*, 139 Or. App. 459, 462, 912 P.2d 411 (1996). For a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. *Moon v. Moon*, 140 Or. App. 402, 407, 914 P.2d 1133, *rev. den.*, 323 Or. 484, 918 P.2d 848 (1996).

If the contractual provision at issue is still ambiguous after examining the text and its context, the second step "is to examine extrinsic evidence of the contracting parties' intent." *Yogman*, 325 Or. at 363. In determining whether an ambiguity exists, the court may consider parol and other extrinsic evidence. *Moon*, 140 Or. App. at 407; *see also Adams v. Knoth*, 102 Or. App. 238, 243-44, 794 P.2d 796 (1990) ("in deciding if the language of a contract is ambiguous, it is

proper for the court to consider extrinsic evidence regarding the circumstances under which the agreement was made or to which it relates."). The parties' "practical construction of an agreement may hint at their intention." *Yogman*, 325 Or. at 364.

If the first two analytical steps have not resolved the ambiguity, the court proceeds to the third and final analytical step: the use of "appropriate maxims of construction." *Id.* Presumably, if the language is still ambiguous, then what the parties intended by that language is to be decided by the trier of fact. *See Oregon Sch. Employees Ass'n v. Rainier Sch. Dist. No. 13*, 311 Or. 188, 194, 808 P.2d 83 (1991) ("If contract terms are ambiguous, then the trier of fact is to ascertain the intent of the parties and construe the contract consistently with their intent.").

4. Considering the text of the Lease as recited in Paragraphs 18 and 19 of the Findings of Fact in the context of the document as a whole, I conclude as follows:

a. The Lease, as written, is not ambiguous.

b. Repairs/Maintenance: Sections 8a and 20 must be read together. Mattel assumed all repair and maintenance obligations, with all such repairs to be in quality and class equal to the original work or installations. This obligation is in no way diminished by the terms of Section 20. However, nothing in the Lease requires Mattel to build new buildings, to bring existing buildings up to current code requirements, or to retrofit the buildings to comply with the accessibility requirements of the American with Disabilities Act ("ADA").

c. Indemnification: The term "predecessors-in-interest," as used in Section 13a, includes Sawyers and GAF. The term would otherwise be meaningless since View-Master, the tenant under the Lease, had

no other predecessors-in-interest. Therefore, Mattel agreed to a comprehensive indemnification of Hall Street, including for occurrences prior to the original lease: The only exception arises when Mattel, Tyco, and View-Master (i.e., not including Sawyers and GAF) have been in compliance with applicable environmental laws and have not directly or indirectly contributed to the presence or use of the particular hazardous waste. This exception applies to both the cleanup of hazardous wastes and to any other liability, damages, or expenses.

d. Environmental: In addition to the indemnification clause, Section 13a, Mattel agreed in Section 12 to assume all liability for the use or presence of hazardous wastes irrespective of when the use occurred. However, the same exception applies.

Environmental Issues

5. TCE: Mattel is not liable for the TCE contamination to the shallow soil and groundwater on the Property. Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with respect to TCE and, therefore, the exception to liability under Sections 12 and 13a have been met. They did not use TCE and their actions have not been shown to have resulted in additional TCE contamination. Their failure to test for, or otherwise discover, the TCE contamination does not constitute a violation of "applicable environmental laws" regarding TCE.

6. TPH: Mattel is liable for the TPH contamination under Buildings 400 and 800/900. Although this contamination poses no immediate risk and remediation is only required if the buildings are removed, it must eventually be cleaned up. Mattel is only responsible for remediation costs and not for any demolition or restoration costs since the cleanup is not required until the buildings are removed. The cost of exca-

vating, hauling, and disposing of this soil and concrete is not "in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street," *i.e.*, $130,000.00.

7. Water Rights: Mattel is not liable for loss of the use of the well due to TCE contamination of the deep aquifer. Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with TCE and, therefore, the exception to liability under Sections 12 and 13a have been met. They did not use TCE and their actions have not been shown to have resulted in additional TCE contamination. Their failure to test well water for contaminants may constitute a violation of other laws, but does not constitute a violation of "applicable environmental laws" regarding TCE.

Hall Street specifically argues that Mattel violated "applicable environmental laws" by violating ORS § 448 and OAR § 333-061, which are provisions administered by the Oregon Health Division of the Department of Human Resources that obligate both the owner and operator of public water systems to test the water. However, as far as the Lease is concerned, these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination.

8. Expenses: Mattel is not liable for the expenses incurred by Hall Street in relation to the DEQ proceeding relating to the deep aquifer contamination by TCE, for environmental consulting services performed by Dames & Moore, for legal services rendered by Short, Cressman, or in pursuing claims against its own insurers. These expenses primarily relate to TCE contamination for which Mattel is not responsible and the non-TCE related expenses cannot be readily determined from the evidence.

Repair Issues

9. Mattel met its repair and maintenance obligations under Sections 8a and 20 prior to vacating the Property on May 31, 2001.

10. The Lease did not require Mattel to upgrade the facility beyond what was required during its leasehold interest, since such upgrades would clearly be in "quality and class" greater than the original works. Oregon statutes explicitly do not require buildings to upgrade to newer requirements so long as the same occupancy is being continued. Uniform Building Code § 1101.5, 3401; Oregon Electrical Specialty Code, Chapter 27.01.040; see also Prudential Insurance, .65. F.3d at 372-74.

11. Therefore, since none of the required repairs involved substantial alterations to the buildings on the Property, Mattel was not required to bring the buildings up to current code standards or to bring the buildings into compliance with the accessibility requirements of the American with Disabilities Act.

12. The only evidence is that the leak in the roof over Building 800 developed after May 31, 2001.

Indemnity front Third-Party Lawsuits

13. Hall Street is not entitled to any further indemnification from Mattel for the third-party lawsuits since these claims all related to TCE contamination. As noted above, Mattel is not liable for the TCE contamination, having met the exception under Sections 12 and 13a. Section 13a(iv) likewise provides an exception to liability for the costs of defending these lawsuits.

CONCLUSION

Based on the foregoing, the ultimate issues are answered as follows:

A. The repairs and maintenance that Mattel performed prior to May 31, 2001, satisfied its repair and maintenance obligations under the .Lease.

B. The payments Mattel has made to Hall Street in connection with litigation brought by third patties has satisfied its indemnity obligation under the Lease.

C. Hall Street has not suffered any compensable losses for soil contamination in excess of the amount previously offered to Hall Street by Mattel, for expenses relating to the deep aquifer contamination, for damages from the right to withdraw water, for expenses for consulting services performed by Dames & Moore, for expenses for legal services rendered by Short Cressman, or for expenses incurred in pursuing claims against Hall Street's insurers.

D. Considering the foregoing and the Court's prior rulings in this case, Mattel is the "prevailing party" for purposes of this litigation and is entitled to its attorneys' fees, costs, and expenses under the Lease incurred as a result of this litigation.

IT IS THEREFORE the Order of the Arbitrator, pursuant to the Arbitration Agreement between the parties, that judgment be granted to Mattel, Inc. on all issues presented, and Hall Street take nothing beyond the sum of $130,000.00 previously offered. Mattel is directed to submit its statement of attorney fees and costs by January 11, 2002. Hall Street is directed to file its objections by January 18, 2002. Oral argument, if requested, 'will be held via conference telephone call thereafter.

Dated this 2nd day of January, 2002.

/s/ Larry T. Coady
LARRY T. COADY
Arbitrator

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed APR 29, 2002]

Case No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

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JONES, *Judge*:

OPINION AND ORDER

Plaintiff Hall Street Associates ("Hall Street") brings this action against defendants Mattel, Inc. ("Mattel") and its predecessors for indemnification arising out of a lease agreement. Having resolved the other issues in prior proceedings, the court now addresses the issue of Mattel's liability for environmental cleanup and related costs. These issues were submitted to an arbitrator on December 12-14, 2001, who found generally in favor of Mattel and awarded fees and costs.

The case is now before me on Hall Street's Motion for an Order Vacating, Modifying and/or Correcting the Arbitration Findings of Fact and Conclusions of Law (# 70) and Hall Street's Motion to Strike (# 79). After considering the parties' arguments, Hall Street's Motion to Vacate (# 70) is GRANTED and its Motion to Strike (# 79) is DENIED as moot.

BACKGROUND

This case involves several disputes between a landlord and its tenant over the tenant's obligations under a lease agreement. Plaintiff Hall Street Associates, L.L.C. ("Hall Street") is the owner of the property at issue, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "property"). Defendant Mattel, a Delaware corporation doing business in Oregon, leased the premises from Hall Street, until May 31, 2001.[1] In this portion of the action, Hall Street

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[1] In its original complaint, Hall Street also asserted that Mattel was attempting to prematurely terminate its lease in violation of the lease agreement. After a bench trial in which the court reviewed the lease agreement and parol evidence surrounding its execution, I held that Mattel could terminate its lease, anytime after May of 1997, with one year's notice. Accordingly, having given notice of termination in May of 2000, Mattel terminated the lease in May of 2001.

contends that Mattel is liable for cleanup and third party litigation costs.

History

The relevant history surrounding the premises began more than 50 years ago, when Sawyer's, Inc., owned the property and began a toy manufacturing facility on the site.[2] Sawyer's was acquired by GAF Corporation in 1967, which continued the toy manufacturing operations. GAF eventually sold the premises to View-Master in 1981, which operated a similar toy operation on the site. In 1983, View-Master sold the property to Western International Properties, but then leased back the property from Western to continue its operations. In 1984, Western subdivided the property and sold the relevant portion of the property to John Eyler. Mr. Eyler then conveyed the property to Cascade Square Associates in 1985. In 1989, while View-Master was still leasing the property, View-Master was acquired by Tyco.[3] Mattel acquired Tyco in 1997. Finally, in 1998, Cascade transferred its ownership interest in the property to Hall Street. The current action is primarily between Hall Street and Mattel, as successors in interest.

The Lease Agreements

On March 5, 1991, View-Master entered into a Lease Agreement (the "Lease") with Cascade Square Associates, pursuant to which Cascade Square Associates agreed to lease the premises to View-Master.[4] The Lease was negotiated by Robert Hibbs, an attorney and partner for Cascade, and

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[2] At that time, the property was separated into three parcels: parcels 1, 2 and 3. The only parcel relevant to this action is parcel 1, and I therefore discuss parcel 1 in this opinion.

[3] Tyco refers collectively to Tyco Industries, Inc., Tyco Manufacturing Corporation and Tyco Toys, Inc.

[4] The Lease was substantially similar to the original lease executed on June 1, 1985 and containing the same basic rights and responsibilities.

Dennis Wesolowski and Michael Kennedy, attorneys for View-Master. The Lease provided that View-Master would lease the property for commercial purposes for a term of approximately six years. Because View-Master and its predecessors had used the property and operated its facilities for many years, they were generally more familiar with the condition of the property than Cascade. Accordingly, the Lease provided that with certain limited exceptions, View-Master would indemnify Cascade for any activities undertaken by it or its predecessors on the property.

On April 29, 1996, Cascade Square Associates and View-Master executed an amended lease (the "Amended Lease"), which was substantially similar to the 1991 lease. After acquiring Tyco, Mattel became the tenant under the Amended Lease in 1997. Mattel informed Hall Street in May of 2000 that it intended to terminate its lease, and the lease was terminated on May 31, 2001.

Environmental Issues on the Property

In 1950, a well and water tower were installed on the property to supply water to the facility. Thereafter, between 1951 and 1980, Sawyers, Inc. and GAF used trichloroethene ("TCE") in its toy manufacturing operations. While most of the work with TCE was done on the surrounding areas of the property, and not the property at issue in this action, Sawyers/GAF did dispose of sanitary wastes through a septic tank and drainfield located at the north end of the property. There is no evidence that any party used TCE in any operations on the property after 1981. It is undisputed that neither Mattel nor any of its predecessors, however, ever tested the well water, groundwater or shallow soils for contaminants.

In March of 1998, Hall Street commissioned SECOR, an environmental consultant, to test the property's well water for pollutants. SECOR discovered that the water contained TCE

levels that far exceeded the federal maximum allowable level.[5] Upon this discovery, the Oregon Department of Environmental Quality ("DEQ") began investigating the contamination and planning remedial measures. The DEQ's investigations revealed additional contaminants, including petroleum hydrocarbons ("TPH"), cyanide, chromium and silver. The contamination was discovered on the property as well as its adjacent parcels, and was found in the well water, the shallow soil, the groundwater and the deep aquifer underlying the property. Upon discovery of the extensive contamination at the site, Mattel shut down the well. The shutdown continues today.

In November of 1998, Mattel and GAF entered into a consent order with the DEQ, pursuant to which GAF agreed to investigate the environmental conditions of the property and Mattel agreed to provide public outreach and communications to its employees. As part of the site investigation, the DEQ performed a risk assessment ("RA") to evaluate the levels of contaminants and the dangers they posed. The RA identified current and future risks at the site:

> 1) Unacceptable risks from TCE in the deep aquifer underlying the property, if that source is used for drinking water; and 2) Unacceptable risk from TCE in the drainfield area, primarily faced by trench workers performing excavation in that area who may be exposed to shallow groundwater. In addition, petroleum hydrocarbons were identified in the soil located under certain buildings on the property. The DEQ found that the hydrocarbons pose no threat as long as the buildings remain, but noted that if the buildings were ever removed, the hydrocarbons in the soil would have to be treated.

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[5] The Federal Drinking Water Standard for TCE is 5 micrograms per liter (ug/l). The well water on the property purportedly contained TCE in concentrations of 1220 to 1520 ug/1.

On October 29, 2001, the DEQ issued its Recommended Remedial Action Staff Report for the Property. Thereafter, G-1 Holdings, the successor to GAF, undertook the investigation and cleanup on the property. The DEQ is currently supervising the remedial work being performed by G-1 holdings.

Repair Issues on the Property

In the arbitrator's decision, he found that Mattel and its predecessors had "failed to repair and maintain the Property as required by Section 8(a) prior to 2000." See Arbitrator's Findings of Fact and Conclusions of Law ("FFCL"), at ¶ 35. The arbitrator also found, however, that Mattel did initiate repair efforts in 2000, in preparation for terminating the Amended Lease. Mattel offered to pay Hall Street the cost of the necessary repairs, in lieu of performing them, but Hall Street refused. Mattel then proceeded with the repair work, keeping Hall Street apprized of the progress of the work with regular status reports. The City of Beaverton eventually inspected and approved Mattel's repair work. Mattel spent in excess of one million dollars in repairs on the property, and in its final inspections of the property before relinquishing control to Hall Street, it determined that the structures were in good condition, the roofs were leak-proof, and all the mechanical, electrical, water and other equipment, pipes, fixtures, pavement and systems were in good working order. The evidence indicates that Hall Street presented no evidence regarding the condition of the property when View-Master began its lease, and did not inspect Mattel's repair work while it was being performed.[6]

[6] In its motion to vacate, Hall Street does not challenge the arbitrator's decision with respect to Mattel's repair efforts.

Third Party Lawsuits

After the contamination was discovered, former employees of Tyco brought suit against Hall Street and Cascade for injuries allegedly caused by their negligence in permitting and/or not detecting the TCE contamination. These cases are identified as Keith, Phelps and Schiffer. They were eventually dismissed for lack of proof of any injury caused by the condition of the property. In a fourth action, the Christopherson case, the daughter of a Tyco worker brought suit against GAF, Hall Street and Mattel, also for injuries allegedly caused by the TCE contamination at the site. This case, too, was dismissed for inadequate proof of injury, and Mattel has paid all costs incurred in litigating this action.

Hall Street initiated the instant action on March 10, 2000. Its complaint raised three general issues: 1) Whether Mattel could legitimately terminate its lease on May 31, 2001, if it provided one year's notice of termination; 2) Whether Mattel was obligated to indemnify Hall Street for costs related to environmental cleanup; and 3) Whether Mattel was obligated to indemnify Hall Street for expenses it incurred in defending itself against third party lawsuits.

The first issue was resolved by a bench trial to this court on April 27, 2001. The remaining issues were resolved in an arbitration held on December 12-14, 2001, in which the arbitrator found generally in favor of Mattel. He concluded that Mattel was not obligated to indemnify Hall Street either for environmental cleanup costs or for third party lawsuits.[7] In a second opinion, the arbitrator ordered Hall Street to pay Mattel for costs and fees incurred in litigating this action, in the sum of $441,545.58.

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[7] The arbitrator did order Mattel to pay Hall Street $130,000 for Mattel's liability for the TPH contamination under buildings on the property, but Mattel had already agreed to pay this amount.

STANDARD OF REVIEW

Typically, arbitration awards are given substantial deference and will not be set aside unless the arbitrator acted in manifest disregard of the law. Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) ("Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court . . . will not set it aside for error, either in law or fact . . . . An arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of law'"). Parties are free, however, to draft a contract that sets rules for arbitration and dictates an alternative standard of review. See, e.g., LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997) ("Federal courts can expand their review of an arbitration award beyond the FAA's grounds, when . . . the parties have so agreed"). An intent to specify an alternative standard must be clearly expressed. *Id.*

In this case, the parties drafted an Arbitration Agreement that set the rules for arbitration. Paragraph 27 of the Rules for Arbitration set forth the applicable standard of review: "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." Thus, the court must review the arbitrator's findings of fact for substantial evidence, and his conclusions of law for error.

DISCUSSION

I. Plaintiff's Motion to Vacate, Modify or Correct Arbitration Award

Following arbitration, the arbitrator issued two separate opinions in this action. First, on January 2, 2002, he issued

findings of fact and conclusions of law in which he found for Mattel as to liability (the "January 2 findings"). Second, on January 29, 2002, he issued findings of fact and conclusions of law in which he awarded fees and costs to Mattel ("January 29 findings"). Hall Street filed its motion to vacate, modify and/or correct the arbitration award on February 2, 2002, challenging both the January 2 findings and the January 29 findings.

A. Liability

In his January 2 findings, the arbitrator reached three basic conclusions with respect to Mattel's liability to Hall Street: 1) Mattel is not liable for environmental cleanup costs because Hall Street has suffered no loss, and even if it had, Mattel remained in compliance with "applicable environmental laws" as required by the Amended Lease; 2) Mattel satisfied all of its repair and maintenance obligations under the Amended Lease prior to its termination; and 3) to the extent it was liable, Mattel fully indemnified Hall Street for the third-party lawsuits brought against Hall Street. In its motion to vacate, Hall Street challenges (1) and (3) above.

1. Timeliness

At the outset, Mattel contends that to the extent Hall Street's motion challenges the arbitrator's findings on the issue of liability, it is time-barred under the Arbitration Agreement because it was filed more than 15 days after the opinion on liability was issued, on January 2, 2002. Hall Street responds that its motion to vacate was filed as a combined motion to challenge both the arbitrator's decision on liability and the decision on attorneys' fees. The arbitrator issued his findings on the fees issue on January 29, 2002. Hall Street filed its motion to vacate both decisions on February 13, 2002.

There is no question that parties consenting to arbitration can stipulate a time period within which any challenge to the arbitrator's decision must be filed. See, e.g., Sheet Metal

Workers' Int'l Assoc., Local No. 252 v. Standard Sheet Metal, Inc., 699 F.2d 481, 482-83 (9th Cir. 1983). Mattel contends that the Arbitration Agreement unambiguously provides that any motion challenging any decision of the arbitrator must be challenged within 15 days of its issuance. In support, it cites paragraph 3 of the parties' Arbitration Agreement, which provides:

> The arbitrator shall decide the arbitration on or before December 30, 2001, and issue written findings of fact and conclusions of law.[8] Any request for review of the arbitrator's decision will be made by motion to Judge Jones and filed within 15 days of the arbitrator's ruling.

Paragraph 3 does not define the specific "decision" that may be reviewed upon a subsequent motion. Mattel contends that the best reading of this provision is that each "decision" issued by the arbitrator must itself be challenged within 15 days of its issuance. Under this interpretation, Hall Street would have to challenge the liability decision and the fees decision in separate motions, each filed less than 15 days after the decisions were issued.

In further support of this view, Mattel cites 1) paragraph 22 of the Rules of Arbitration, which refers to a decision on the issue of fees as "supplemental" to the underlying decision on the merits, and 2) the "uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final," Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200-02 (1988), and 3) Fed. R. Civ. P. 54(d)(2)(C), which states that an award of fees should be "set forth in a separate document." Relying on the Arbitration Agreement and the relevant law, Mattel

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[8] By stipulation of the parties, the December 30, 2001 deadline was extended to allow the arbitrator to issue his decision on the merits no later than December 31, 2001 and a decision on the issue of fees no later than January 28, 2002.

argues that the Arbitration Agreement is unambiguous, permits no consideration of extrinsic evidence, and mandates the conclusion that the motion to vacate is untimely to the extent it challenges the January 2 FFCL.

Hall Street correctly points out, however, that several provisions of the Arbitration Agreement support the conclusion that a single motion challenging any and all conclusions reached by the arbitrator was intended. First, paragraph 3, relied on heavily by Mattel, states that the arbitrator shall decide "the arbitration," implying that he will issue one comprehensive opinion that may then be challenged by the losing party. Paragraph 1 of the Arbitration Agreement states that the parties "agree to arbitrate before one arbitrator all remaining issues." Paragraph 1 itself then refers to paragraph 27, which permits this court to "enter judgment upon any *award* either by confirming the *award* or by vacating, modifying or correcting the *award*" (emphasis added). In other places in the Arbitration Agreement, including paragraphs 7 and 19, the arbitrator's final decision is referred to as an "award" as well. Relying on these provisions, Hall Street contends that the Arbitration Agreement on this issue is, at the very least, ambiguous, and permits consideration of outside evidence.

Oregon law provides that in order for a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. Hoyt Street Properties, L.L.C. v. Burlington Northern & Santa Fe Ry. Co., 38 F.Supp.2d 1185 (D. Or. 1999). In this case, in light of the use of "award" and "decision" in separate provisions of the Arbitration Agreement, both parties have probably put forth plausible interpretations of the contract, and the court therefore finds that it is ambiguous.

Finding an ambiguity on this issue permits the court to consult extrinsic evidence to shed light on what was intended

by the parties. Hall Street cites two pieces of outside evidence to support its claim that the parties intended that a final decision by the arbitrator resolving all issues in the case would be challenged in a single motion. First, it cites a January 2, 2002 letter written by the arbitrator, in which the arbitrator indicates that he will issue one comprehensive "award" that may then be challenged here. In the January 2 letter, the arbitrator stated that "once the attorney fees and costs are resolved, I will issue the Arbitration Award," While this letter certainly does not, on its own, evidence the view of the parties, the lack of response or clarification by Mattel indicates that its understanding was not inconsistent. Second, it contends that the parties initially intended that the arbitrator would issue one final decision on all issues no later than December 30, 2001. When it became apparent that the arbitrator would not meet this deadline, the parties apparently agreed to extend the deadline to December 31, 2001, for the decision on the merits, and January 28, 2001, for the decision on fees. At the time the extension was discussed, Hall Street states that the parties neither envisioned nor discussed a requirement that the decisions be challenged in separate motions. The extrinsic evidence thus indicates that to the extent it was considered, the parties intended that the arbitrator would issue one "award," which could then be challenged in a single motion within 15 days.

As the court has discussed, there are persuasive arguments to the contrary. On the whole, however, the Arbitration Agreement and the facts support Hall Street's argument that its Motion to Vacate was timely filed. In light of the parties' substantial interests at stake in this case, it would be extraordinary to deny either party its right to judicial review on the basis of a disputable filing deadline, the alleged violation of which prejudiced no one. Given these considerations and the discussion above, the court concludes that Hall Street's Motion was timely filed.

2. The Merits

The key issue before me is whether the arbitrator erred in concluding that Mattel was in compliance with applicable environmental laws while leasing the property, and therefore was not liable to Hall Street for environmental cleanup costs. Under the lease, because Mattel and its predecessors, especially View-Master, were most familiar with the condition and operations at the property, they were obligated under the Lease to indemnify Hall Street for Mattel's and its predecessors' activities at the site. Section 6.3 of the original lease, for example, provided as follows: "Tenant shall indemnify and defend Landlord from any claim, loss, or liability arising oat of or related to any action or inaction of Tenant, its employees, agents or invitees or any condition of the Property." Other provisions of the original lease were consistent with this clause:

- Section 5(b): Tenant must comply with "all applicable laws, rules and regulations of any public authority";
- Section 12(a): "Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises . . . Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release [of hazardous wastes]";
- Section 12(b): "Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees of hazardous substances. . . . Tenant assumes liability for the use or presence . . . of any hazardous waste. . . . Tenant assumes all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and defend Landlord, its officers, agents, and employees, against

> and from any and all losses, costs, damages, expenses . . . or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials."

These provisions consistently impose a duty on Mattel to indemnify Hall Street for costs associated with environmental damage, and neither party disputes that this was the general rule under all of the lease agreements.

There was an exception to Mattel's duty to indemnify, however, found in section 12(c) of the Lease. Section 12(c) provided:

> To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b above, Tenant shall not be held liable following the expiration of this Lease term for the following . . . (iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

A similar provision conditionally excepting the tenant's liability is found in section 13(a) of the lease agreements.

In the January 2 findings, the arbitrator found that "Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with respect to TCE and, therefore, the exception to liability under Sections 12 and 13a have been met." See January 2, 2002 findings, p. 16 at ¶ 5. The arbitrator acknowledged that Mattel and its predecessors failed to test for TCE contamination at the site, constituting a violation of O.R.S. § 448 and O.A.R. § 333-061, but concluded that these provisions were not "applicable environmental laws." He stated that these sections were not applicable because they were designed to target the specific harm of injury to end users caused by contaminated drinking

water, and not potential economic injury to a private landowner. He noted that the law is administered by the Oregon Health Division of the Department of Resources. Citing no specific provision of the lease, the arbitrator reasoned that "as far as the Lease is concerned, these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination." January 2 findings at ¶ 7, pp. 16-17. Relying on this conclusion, the arbitrator found that Mattel had remained in compliance with applicable environmental laws, thereby meeting the exception to its general duty to indemnify found in sections 12(c) and 13(a) of the Lease. Hall Street contends that this conclusion was in error.[9]

After careful consideration, I conclude that Mattel's failure to test the water for contaminants was in fact a violation of "applicable environmental laws" within the meaning of the lease. Several considerations lead me to this conclusion. Generally, an analysis of the lease Makes clear that it was written to impose broad liability on the tenant for any environmental damage on the property. The two exceptions to this liability, found in sections 12(c) and 13 of the lease, freed the tenant from liability *only* if it was in compliance with all "applicable environmental laws."

The arbitrator's contrary reasoning—that Oregon's Drinking Water Quality Act ("ODWQA") does not constitute "applicable environmental laws" because "these health provisions are designed to protect a specific type of injury, i.e., health injury to people from drinking the water, and are

[9] Hall Street also contends that Mattel violated applicable environmental laws by discharging TCE-contaminated water into the storm and sanitary sewer systems. Based on the information before the court, it appears that this was not properly submitted to the arbitrator, who made no finding on this issue, and the court therefore declines to reach the issue here.

not designed to protect landowners from having their property protected from environmental contamination"—is an overly restrictive construction of "applicable environmental laws" that is not warranted by the language of the lease. The Act is certainly "applicable" to Mattel, as the tenant on the property. Further, while the Act is administered by the Oregon Health Division, along with the DEQ, this does not necessarily indicate that the Act is not also an environmental law. The Act is the Oregon counterpart to the Federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26, which is generally considered an environmental law. See, e.g., In re Willy, 831 F.2d 545, 546 (5th Cir. 1987); 323-343 E. 56th St. Corp. v. Mobil Oil Corp., 906 F. Supp. 669, 685 n21 (D.D.C. 1995); Roe v. Wert, 706 F. Supp. 788, 791 (W.D. Okla. 1989). Its purpose—"to protect the public health through insuring safe drinking water within a water system"—is complementary to the goals of most environmental statutes. The Clean Air Act, for example, is designed "to promote the public health and welfare and the productive capacity of the population." See 42 U.S.C. 7401(b)(1). See also Toxic Substances Control Act, 15 U.S.C. §§ 2601(b)(1) (noting that the goal of the TSCA is to "regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment"). In fact, the environmental component of the ODWQA is undeniable: the Act protects the public from potential health hazards resulting from environmental damage. Significantly, Mattel does not dispute the general conclusion that the ODWQA is, standing alone, an environmental law.

Instead, Mattel contends that the arbitrator was correct in concluding that the Act is not "applicable," because the Act is "a statute administered by the Health Department for the express purpose of protecting the public from tainted drinking water" and not "an applicable environmental statute designed to protect Hall Street from the property damage." See Mattel's Memorandum in Opposition, p. 22. This reasoning,

however, defies logic. *No* environmental statute advances such a purpose; the *purpose* of such statutes is to protect the environment and human health.

Mattel also argues that even were the Act "applicable" to Mattel within the meaning of the lease, its violation of the Act resulted in no loss to Hall Street, and therefore cannot be a basis for Mattel's liability to Hall Street. I reject this argument for two reasons. First, there is no requirement in the lease that there be actual causation of loss. The lease is written to simply impose broad liability on Mattel for environmental cleanup costs, an obligation that it can avoid only if it complies with all applicable environmental laws.[10]

Furthermore, even were the arbitrator correct in his conclusion that there is a causation requirement in the lease, the third party lawsuits filed against Hall Street could in fact constitute loss caused by Mattel's violations. While it is true that the Phelps, Schiffer and Keith cases alleged negligence only against Hall Street, had Mattel tested the water and ceased its use, the lawsuits arguably would not have been filed. At the very least, the existence of such suits creates a factual issue to be addressed on remand as to whether there is loss resulting from Mattel's violation.

In sum, the arbitrator erred as a matter of law in concluding that Mattel's failure to test for contaminants did not constitute

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[10] Mattel contends that the arbitrator concluded that there must be causal link between the alleged violation of applicable environmental laws and any losses incurred by Hall Street, and that this conclusion is entitled to deference because it rests on a factual determination of the parties' intent in the lease. The arbitrator does not explicitly reach this conclusion, however. Furthermore, to the extent the arbitrator reaches this conclusion implicitly, he cites no provision of the lease in support and does not discuss any reasoning for drawing such a conclusion. In the face of a rather clear contract provision, which imposes liability simply if Mattel violates "applicable environmental laws," such a conclusion devoid of reasoning or support is not entitled to substantial deference.

a violation of applicable environmental laws. Accordingly, this case is remanded to the arbitrator for further consideration in accordance with this opinion.

3. Mattel's Contingent Appeal

Finally, Mattel "contingently" appeals the arbitrator's finding that GAF and G-1 Holdings were Mattels' predecessors-in-interest and that Mattel is therefore liable under the lease for their contamination. In his January 2 findings, the arbitrator concluded that when the original lease was executed by View-Master as the tenant, View-Master's consent to indemnify the landlord for the acts of its predecessors must necessarily include GAF and Sawyers, because there were no other predecessors to View-Master with respect to the property. The arbitrator stated:

> The term "predecessors-in-interest," as used in Section 13a, includes Sawyers and GAF. The term would otherwise be meaningless since View-Master, the tenant under the Lease, had no other predecessors-in-interest Therefore, Mattel agreed to a comprehensive indemnification of Hall Street, including for occurrences prior to the original lease.

January 2 findings, p. 15 at ¶ 4c.

Mattel contends that the arbitrator's conclusion was in error, because he incorrectly found that GAF and Sawyers were the only potential predecessors to View-Master at the time the original lease was executed. It asserts that the View-Master entity that executed the original lease was the successor to a previous View-Master entity that owned the property after GAF and Sawyers. It also cites the testimony of Michael Kennedy, negotiating the leases on behalf of Tyco, who stated that he did not intend the term predecessor-in-interest to include GAF and Sawyers. According to Mattel, there is no testimony to the contrary by any representative of Hall Street or Cascade.

From a review of the arbitrator's decision, it appears that the arbitrator did not review substantial evidence relevant to the parties' intent in construing the term predecessors-in-interest. He states, simply, that the term includes GAF and Sawyers because "[t]he term would otherwise have no meaning," yet he does not mention Mattel's assertion that a previous View-Master entity occupied and oversaw operations on the property. He does not discuss the relationship between GAF and Sawyers on the one hand and Mattel on the other, which is clearly significant in determining whether GAF and Sawyers are actual predecessors or merely prior owners of the property. Finally, he does not address the testimony of Michael Kennedy, who stated that his intent as a negotiator of the lease was to include only the previous View-Master entity as a predecessor in interest. In light of the substantial amount of evidence that is not addressed in the arbitrator's decision, the court is unable to determine whether he considered this substantial evidence and therefore whether his conclusion on this issue is warranted. Accordingly, on remand, the arbitrator shall fully develop the factual record relevant to the meaning of the term "predecessor-in-interest" in order to ascertain the parties' intent, and reach a finding based on this thorough review of the facts in the record.

B. Attorneys' Fees and Costs

Based on the conclusions reached in this opinion, the arbitrator's decision awarding fees and costs to Mattel as the prevailing party is hereby vacated. Once the underlying issues of liability and damages are resolved, the arbitrator may then revisit the issue of fees.

II. Plaintiff's Motion to Strike

Plaintiff also filed a motion to strike Mattel's "supplemental authority" (# 79). In light of the conclusions reached in the court's opinion on plaintiff's motion to vacate, plaintiffs motion to strike is denied as moot.

CONCLUSION

Plaintiffs Motion to Vacate (# 70) is GRANTED and this case is remanded to the arbitrator for further consideration in accordance with this opinion. Plaintiff's Motion to Strike (# 79) is DENIED as moot.

DATED this 29th day of April, 2002.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, an Oregon corporation,
Defendants.

AMENDED ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

THIS MATTER is before the arbitrator on remand from the U.S. District Court for the District of Oregon. U.S. District Judge Robert E. Jones issued his Opinion and Order, dated April 29, 2002, and concluded as follows:

1. The arbitrator erred as a matter of law in concluding that Mattel's failure to test for contaminants did not constitute a violation of applicable environmental laws. Accordingly, this case is remanded to the arbitrator for further consideration in accordance with this opinion.
2. On remand, the arbitrator shall fully develop the factual record relevant to the meaning of the term "predecessors-in-interest" in order to ascertain the parties' intent, and reach a finding based on this thorough review of the facts in the record.

3. The arbitrator's decision awarding fees and costs to Mattel as the prevailing party is hereby vacated. Once the underlying issues of liability and damages are resolved, the arbitrator may then revisit the issue of fees.

Following oral argument on remand on August 20, 2002, the arbitrator took this matter under advisement. After further review of the record in light of Judge Jones' Opinion and Order, the following Amended Findings of Fact and Conclusions of Law are hereby entered:

AMENDED FINDINGS OF FACT

1. Plaintiff Hall Street Associates, L.L.C. ("Hall Street") is a Washington limited liability company and is the owner of certain property in Washington County, Oregon, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "Property"). Cascade Square Associates ("Cascade") is the Sole principal of Hall Street and its predecessor-in-interest.

2. Defendant Mattel, Inc.. ("Mattel") is a Delaware corporation doing business in Oregon. Its "predecessors-in-interest," as that term is commonly understood, but without regard to the "Lease" referred to below, are View-Master International Group, Inc., and View-Master Ideal Group (collectively "View-Master"); and Tyco Industries, Inc., Tyco Manufacturing Corporation, and Tyco Toys, Inc. ("collectively "Tyco").

History of the Property

3. The Property was once a part of a larger, 50-acre L-shaped property. The larger property consisted of three distinct parcels, known as Parcels 1, 2, and 3.

4. From 1951 to 1967, Sawyers, Inc. ("Sawyers") owned Parcels 1, 2, and 3, and operated a toy manufacturing facility.

5. In 1967, GAF acquired Sawyers and continued operations at the site as a toy manufacturing facility.

6. In 1979, GAF sold Parcel 3 to the Southern Pacific Industrial Development Company.

7. In 1981, GAF sold Parcels 1 and 2 and the toy manufacturing business to View-Master International Group.

8. View-Master International Group owned and operated Parcels 1 and 2 from approximately 1981 to 1983 as a toy manufacturing facility.

9. In 1983, View-Master International Group sold Parcels 1 and 2 to Western International Properties (also known as Western Industrial Properties), but leased back Parcel 1 to continue its toy manufacturing activities.

10. In 1984, Western International Properties subdivided Parcel 1, with the northwest corner sold to Commercial Real Estate Company, which redeveloped it as an office building. The remaining portion of Parcel 1 (the "Property") and the lease to View-Master International Group was sold to John Eyler in 1984. Mr. Eyler subsequently conveyed Parcel 1 and the lease to View-Master International Group to Cascade in 1985.

11. In 1987, View-Master International Group became View-Master Ideal Group.

12. In 1989, Tyco acquired the assets of View-Master Ideal Group, which remained a subsidiary of Tyco.

13. In 1997, Mattel acquired Tyco.

14. In 1998, Cascade transferred its ownership interest in the Property to Hall Street.

15. On May 31, 2000, Mattel sent Hall Street a Notice of Termination informing Hall Street that it was terminating the lease effective May 31, 2001, almost two years prior to the scheduled lease termination date in 2003. At an earlier stage of this litigation, Hall Street alleged that Mattel's early termination of the lease term was not permitted under the

terms of the lease. Judge Jones bifurcated that issue from the issues in this arbitration and, after a two-day bench trial, concluded that Mattel's termination did not violate the agreement. Accordingly, Mattel's early termination of the lease is not an issue in this arbitration.

16. The Lease terminated and Mattel vacated the Property on May 31, 2001. Except for remediation efforts, the Property remains unoccupied.

The Lease

17. On March 5, 1991, View-Master entered into a Lease Agreement with Cascade for the Property (the "Lease"). On April 26, 1996, Cascade and View-Master executed a First Amendment to the Lease, which, among other items, extended the term of the Lease.

18. The Lease was negotiated by Robert Hibbs, an attorney and partner of Cascade, for the Landlord, and Dennis Wesolowski and Michael Kennedy, attorneys for View-Master. Both parties participated in drafting certain portions of the Lease.

19. The Lease was negotiated in the context that View-Master was the only party with intimate knowledge of the property and would, therefore, indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease of June 1, 1985, with limited exceptions.

20. The Lease replaced the Original Lease dated June 1, 1985, which had provided in Section 6.3 as follows:

> **"Tenant shall indemnify and defend Landlord from any claim, loss, or liability arising out of or related** to any action or inaction of Tenant, its employees, agents or invitees or **any condition of the Property."** (Emphasis added.)

21. The recitals to the Lease provide as follows:

> **"B. View-Master designed and constructed the Premises as a toy manufacturing facility at a time when it owned the underlying real property. View-Master has been the only party to occupy or conduct business on the Premises. View-Master-continued to lease the Premises from Landlord pursuant to the Original Lease which provided that View-Master indemnified Landlord for its actions with respect to the Premises or any condition of the Premises. The parties intended that such indemnity applied to** Tenant's actions in constructing the Premises, including its choice of building materials, and **all activities with respect to the Premises whether or not they occurred before the date of the Original Lease.**
>
> **C. In Executing this Lease, the parties intend that Tenant shall assume View-Master's obligation to indemnify Landlord under the Original Lease, which indemnity obligation shall survive termination of the Original Lease, and intend that Tenant shall indemnify Landlord for any actual or potential liability Landlord may be exposed to as a result Of Tenant's future actions with respect to the Premises. Because the Premises are a self-contained manufacturing facility constructed and previously owned by View-Master, and because the Original Lease was on a triple net basis, Landlord has not been actively involved in managing the Premises and relied on View-Master's agreement to indemnify Landlord for its actions."** (Emphasis added.)

22. In addition, the Lease contains the following relevant sections:

a. Section 5.b. provides, in pertinent part:

> **". . . , Tenant shall comply at its expense with all applicable laws, rules and regulations of any public**

authority, including but not limited to those **regarding maintenance, operation, and use of the Premises, use of machinery and signs on the Premises,** and those regarding discharging hazardous materials or any other waste." (Emphasis added.)

b. Section 5.c. provides, in pertinent part:

"Tenant shall not conduct or permit any activities on the Premises that create a nuisance or damage the reputation of the Premises or Landlord's adjoining property, or are reasonably offensive to Landlord, or other owners or users of adjoining property."

c. Section 8.a. provides:

"Maintenance of the Premise. **Tenant will, at its sole cost and expense, maintain the Premises and make repairs to the Premises, including without limitation the** heating, ventilating, air conditioning, mechanical, electrical, elevator, and plumbing systems, **structural roof, walls, and foundations,** the fixtures and appurtenances to the Premises, other improvements, sidewalks and parking areas **as and when required or requested by any governmental agency or when needed to preserve them in good repair, operating condition, Working order and good appearances, and regardless of whether the repairs are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital, or the fault or not the fault of Tenant, its agents, employees, invitees, visitors, or contractors. All such repairs will be in quality and. Class equal to the original work or installations."** (Emphasis added.)

d. Section 12.a. provides, in pertinent part:

"Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises, including but not limited to the Resource Conservation and Recovery Act, as amended

(RCRA), and the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA). . . . Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release [of hazardous wastes] . . . whether occurring before the Lease Commencement Date, or during the Lease term." (Emphasis added.)

e. Section 12.b. provides:

"Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees of hazardous substances as herein defined on the Premises. Tenant shall immediately notify Landlord in writing of any release of hazardous waste. In addition, Tenant assumes liability for the use or presence in the Building materials or on or about the Premises of any hazardous waste including but not limited to asbestos or lead. **Tenant assumes all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and defend Landlord, its officers, agents, and employees, against and from any and all losses, costs, damages, expenses (including environmental abatement costs) or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials.** Subject to the conditions of Section 12.c. below, this provision shall continue in full force and effect regardless of whether this Lease is terminated pursuant to any other provision or the Premises are vacated by Tenant." (Emphasis added.)

f. Section 12.c. provides, in pertinent part:

"To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b. above, Tenant

shall not be held liable following the expiration of this Lease term for the following: . . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building." (Emphasis added.)

g. Section 12.d. provides:

"Hazardous waste, hazardous building materials or hazardous substances for the purposes of this Lease shall be defined to include, but shall not be limited to, the following: . . .

(b) Any substance defined as "hazardous substance," "hazardous material," or "toxic substance" in:

(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(2) the Hazardous Materials Transportation Act, as amended;

(3) the Resource Conservation and Recovery Act, as amended; and

(4) any similar federal, state, or local law or regulation now or hereafter in effect."

h. Section 13.a. provides:

"Indemnification. Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liability, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its officers, contractors, licensees, agents, servants, employees, guests, invitees, **predecessors-in-interest,** or visitors **in or about the Building or Premises as a result of any act, omission or negligence of Tenant or its** officers, contractors, licensees, agents, servants, employees, guests, invitees, **predecessors-in-interest,** or visitors, **whether occurring in** the construction of or choice of building materials for the Building, **occurring during or prior to the Original Lease [or] during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant.**

In the event that Landlord is sued for failure to comply with local, state or federal environmental laws and/or regulations regarding the Premises, and it is alleged the spill or violation occurred over a number of years, some portion of which time is outside of the term of this Lease or the Original Lease, then Landlord shall agree to seek to have the other tenants (whether. prior or subsequent to the Lease or Original Lease), pay for their prorated amount of Landlord's defense costs in such suit. Tenant's obligation to defend shall not be delayed but shall be limited to its allocable portion of such defense costs. Landlord, upon learning of a suit or a potential suit against it under this paragraph shall notify Tenant thereof (the "Notice"). During the following thirty (30) days from such notice the parties shall attempt to negotiate a fair and reasonable allocation of defense costs to be paid by Tenant for such action, based

on Tenant's actual contribution to the damages which are the subject of such suit. . . .

To the extent Tenant has been in compliance with applicable environmental laws, notwithstanding the foregoing language in Section 13.a. above, Tenant shall not be held liable following the expiration of this Lease term for the following: . . .

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc. . . .

(iv) Any other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc. . . .

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building.

The foregoing provisions shall not be construed to make Tenant responsible for loss, damage, liability or expense resulting from injuries to third parties to the extent caused by the intentional or negligent acts of Landlord, or its officers, contractors, licensees, agents, or employees." (Emphasis added.)

i. Section 20 provides, in pertinent part:

"[U]pon expiration of the term of this Lease, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises, together with all keys

thereto, to Landlord in as good condition as when received by View-Master from Landlord under the Original Lease or as thereafter improved, reasonable use, wear and tear excepted."

j. Section 31 provides:

"The Premises and Landlord's adjoining property are both served by a drainage system which consists of open grates and underground sewers and catch basins. Tenant shall maintain in good condition and repair the portion of such system on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system."

k. Section 32 provides:

"The Premises and Landlord's adjoining property are both served by one unified sanitary sewer system. Tenant shall be responsible for maintaining in good condition and repair the portion of such system located on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system."

l. Section 33.h. provides, in pertinent part:

". . . . Landlord further covenants and warrants that at all times during the term hereof, provided Tenant is not in default, Tenant will have full, peaceful and quiet enjoyment of the Premises for the purposes and uses set forth in this Lease."

23. During the negotiations, View-Master asked Cascade to remove the terms "predecessors-in-interest" and "or prior to the Original Lease" from Section 13.a., noting that the language could be construed to refer to Sawyers and GAF and that "the prospect of indemnifying Landlord from acts of

GAF, Sawyers, or others is unfair." Pls. Arb. Exh. 30 and Defs. Arb. Exh. 162. Cascade refused to remove these terms or to substitute' VMIG ("View-Master International Group, Inc.") for "predecessors-in-interest," but did agree to add other language to Section 13.a. limiting View-Master's liability if certain conditions were met. View-Master also asked Cascade to remove the word "tenants" from the seventh line of the second paragraph of Section 13 and replace it with the words "owners or occupants." Again, Cascade refused. Despite those refusals, View-Master signed the Lease.

24. Michael Kennedy and Dennis Wesolowski, in their testimony and narrative statements, make clear that View-Master intended "predecessors-in-interest" to refer to View-Master International Group, Inc. Mr. Kennedy's internal communication of February 8, 1991, supports this view. See Defs. Arb. Exh. 163. Robert Hibbs offered no testimony on this point.

Environmental Issues at the Property

25. From approximately 1951 to 1980, GAF/Sawyers used trichloroethene ("TCE") to remove grease from metal parts. The degreasing operations occurred in a building on Parcel 2, where TCE contamination of the shallow groundwater is found today. GAF/Sawyers also disposed of sanitary wastes via a septic tank and drainfield located at the north end of Parcel 1, where shallow groundwater contamination is also found today. Spills of TCE by GAF/Sawyers occurred at the degreasing location and other areas. Drums of degreaser wastes were dumped on Parcel 3 by GAF/Sawyers. There is no evidence of TCE use at the facility after GAF sold the Property in 1981.

26. The well and water tower on Parcel 1 were installed in 1950. The on-site well supplied facility water.

27. During the period 1981-1998, View-Master, Tyco, and Mattel did not test the well water, groundwater, or shallow soils for contaminants.

28. In March 1998, during testing performed at the instance of Hall Street by SECOR, an environmental consultant, water from the well was discovered to contain TCE at levels far in excess of the federal maximum allowable level. Efforts were initiated under the auspices of the Oregon Department of Environmental Quality ("DEQ") to investigate the environmental contamination problem and plan remedial efforts. Those investigations revealed contamination of the Property and adjacent parcels by several types of contaminants, including TCE, petroleum hydrocarbons ("TPH"), cyanide, chromium and silver. The contamination was determined to exist not only in the on-site well, but also in the shallow soil, groundwater, and deep aquifer underlying the Property.

29. Mattel shut down the well upon discovery of the contamination. This shutdown is permanent and Hall Street has lost any water rights it had.

30. There is insufficient evidence to prove that Mattel's use of the well after 1981 circulated TCE and resulted in additional contamination of the shallow soil and groundwater.

31. There is insufficient evidence to prove that the condition of certain pipes after 1981 resulted in TCE leaks and additional contamination of the shallow soil and groundwater.

32. In November 1998, Mattel and GAF entered into a consent order with DEQ. GAF agreed to investigate the environmental conditions of the Property, and Mattel agreed to provide public outreach and communications to the employees. Interim cleanup actions to address areas of immediate concern were completed during the Summer of 2001.

33. As part of the site investigation, a risk assessment was performed under DEQ's direction to evaluate all contami-

nants at all areas. The risk assessment identified current and future risks at the site in two locations. First, unacceptable risk was identified from TCE in the deep aquifer if that source is to be used as drink water. The risk assessment also identified possible impact to ecological receptors in the wetland, if untreated water from the deep groundwater were ever to be pumped to the surface and discharged.

34. Second, unacceptable risk was identified from TCE in the shallow groundwater located at Parcel 2 in the location of spills from GAF/Sawyers at the degreasing machine area and at Parcel 1 in the GAF/Sawyers drainfield area. This risk was limited to trench workers who may be exposed to shallow groundwater in those areas, should there be any excavation of those areas in the future. The shallow groundwater in all other areas of the Property have only low levels of TCE and other associated compounds present, and therefore no current or future remediation or special conditions are necessary.

35. Petroleum hydrocarbons were also identified in the soil located under Buildings 400 and 800/900 that were used by both GAF and View-Master for injection molding machines and boilers. Because the hydrocarbons capped by the building are immobile, and have low toxicity, DEQ has found that the hydrocarbons are posing no risk and is not requiring their remediation. However, if the buildings were ever removed, and the soil was subsequently disturbed, the hydrocarbons in the soil must, under DEQ's direction, be properly treated.

36. The contaminants in the soil in the remainder of Parcel 1 are below residential cleanup standards; therefore, no current or future remediation or special conditions are necessary as to the shallow soil.

37. The investigation and cleanup of contamination at the Property, to the extent required by DEQ, is being addressed by G-1 Holdings, the successor to GAF, under DEQ's

supervision. On October 29, 2001, DEQ issued its Recommended Remedial Action Staff Report for the Property. If G-1 Holdings fails to pay the costs associated with the investigation and cleanup of contamination at the Property, Hall Street is potentially liable for those costs as the owner.

38. Damages:

(a) TCE contamination to shallow soils and shallow groundwater: Hall Street presented evidence that they were damaged in the sum of $2,558,101.00 for the cost of dewatering and remediation of the contaminated shallow groundwater underlying Buildings 800/900 and 1100/1150, and in the sum of $150,000.00 to complete a site characterization and investigation for purposes of remedial engineering. Mattel presented evidence that only the sum of $9,000.00 need be expended to provide dewatering to protect trench workers.

(b) Loss of water rights: The water rights were non-transferable. Hall Street argues for damages of $8,200,000.00 based upon the cost of replacement water over a 20-year period. Mattel argues that the proper measure of damages is the diminution in value of the Property or of the lease value. Hall Street presented no evidence regarding diminution of value.

(c) Environmental consulting services: Hall Street incurred costs for environmental consulting services performed by Dames & Moore/URS in the sum of $143,630.52.

(d) Legal services in connection with environmental issues: Hall Street incurred costs for legal services rendered by Short, Cressman and Burgess in the sum of $216,036.59.

Repair Issues

39. In general, View-Master, Tyco, and Mattel failed to repair and maintain the Property as required by Section 8.a. prior to 2000.

40. In preparation for terminating the Lease and vacating the Property, Mattel engaged in an extensive program to assess and repair the facility.

41. Mattel offered to pay the Landlord the cost of repair, in lieu of performing them, if the Landlord intended to tear down the buildings to redevelop the Property. Hall Street refused.

42. Mattel provided a list of repairs to the Landlord before beginning work. Mattel kept Hall Street informed by providing regular status reports and providing Hall Street with the opportunity to inspect the work. Neither Hall Street nor Mortenson, Hall Street's consultant, responded to the letters, and neither visited the Property or criticized the work while it was performed.

43. The City of Beaverton inspected repairs on the roof and other building elements both before and after the work was completed, and approved all work performed. All of the materials used in the work performed were equal or better in quality and class to the original work.

44. Mattel expended more than one million dollars in repairs to the Hall Street facility in 2000. In its final inspections before returning the Property to the Landlord at the end of May 2001, Mattel determined that the structures were in good condition, that none of the roofs leaked, and that all of the mechanical, electrical, water and other equipment, pipes, fixtures, pavement, and systems on the Property were in good working order.

45. Hall Street presented no evidence regarding the condition of the Property when View-Master began its lease.

Third-Party Lawsuits

46. Hall Street and Cascade were sued by former employees of Tyco for their negligence as Landlord for the TCE Contamination. These cases are identified as the *Keith, Phelps*, and *Schiffer* cases. Those cases were subsequently dismissed for lack of proof of any injury caused by any condition at the property.

47. Hall Street incurred expenses defending those claims and seeks indemnification from Mattel as follows: For legal services rendered by Schwabe, Williamson and Wyatt: *Schiffer*—$2,170.83; *Phelps*—$7,934.02; *Keith*—$25,390.25; and for legal services rendered by Short, Cressman and Burgess: $26,617.08.

48. GAF Hall Street, and Mattel were also sued by the daughter of a Tyco worker in the *Christopherson* case for personal injuries allegedly caused by TCE contamination

> including remediation of the soil and damage to and loss of use of the buildings themselves, in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street;
>
> (2) Expenses incurred by Hall Street in relation to the DEQ proceeding relating to the deep aquifer contamination by TCE, including any amounts Hall Street may be required to pay to DEQ;
>
> (3) Damages, if any, to Hall Street's use or right to withdraw water from under the property;
>
> (4) Expenses incurred by Hall Street for environmental consulting services performed by Dames & Moore in connection with environmental issues on the property;

(5) Expenses incurred by Hall Street for legal services rendered by Short, Creasman in connection with environmental issues on the property; and

(6) Expenses incurred by Hall Street in pursuing claims against its own insurers regarding all of the above.

(d) Which party is deemed to be the "prevailing party" in this litigation and what amount is it entitled to receive from the other under paragraph 24 of the Lease for the attorney's fees and costs it incurred as a result of this litigation?

2. Hall Street brings each of these claims against Mattel under the theory of breach of contract. That is, Hall Street alleges that Mattel breached the Lease. Under Oregon law, to Maintain an action for breach of contract the plaintiff must establish (1) a valid contract between the parties, (2) a breach or failure without legal excuse to perform any promise that is a part of the contract, and (3) resulting damages to the plaintiff. 17A Am. Jur. 2d Contracts § 716 (1991); Reliable Credit Assoc. Inc. v. Credithrift of America, Inc., 570 P.2d 379, 381 (Or. 1977). For there to be a valid contract, the party bringing the action must be in compliance with the terms of the contract; and not in breach. 17A Am Jury. 2d Contract § 716 (1991). Hall Street, as the plaintiff in this action, has the burden of proof to establish all requisite elements to maintain a breach of contract. Pickard v. Or. Senior Citizens, Inc., 395 P.2d 168, 170 (Or. 1964).

Lease Interpretation

3. Under Oregon law, the construction of a contract is a question of law for the court. *Anderson v. Divito*, 130 Or. App. 272, 277, 908 P.2d 315 (1995) (citing *Timberline Equip. Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 281 Or. 639, 643, 576 P.2d 1244 (1978)). The court's goal is to give effect

to the intention of the contracting parties. *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575-76, 931 P.2d 763 (1997) (citing *Investment Serv. Co.v. Smither*, 276 Or. 837, 843, 556 P.2d 955 (1976) and O.R.S. 42.240 (in the construction of a written instrument the intention of the parties is to be pursued if possible)).

"To interpret a contractual provision . . . , the court follows three steps. First, the court examines the text of the disputed provision, in the context of the document as a whole." *Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019 (1997). "If the provision is clear, the analysis ends." *Id.*

> When considering a written contractual provision, the court's first inquiry is what the words of the contract say . . . . To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question. The meaning of disputed text in that context is then determined. In making that determination, the court inquires whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.

Id. (quoting *Eagle Indus., Inc. v. Thompson*, 321 Or. 398, 405, 900 P.2d 475 (1995).

A contract or term is unambiguous if it has only one sensible and reasonable interpretation. *D & D Co. v. Kaufman*, 139 Or. App. 459, 462, 912 P.2d 411 (1996). For a contract or term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole. *Moon v. Moon*, 140 Or. App. 402, 407, 914 P.2d 1133, *rev. den.*, 323 Or. 484, 918 P.2d 848 (1996).

If the contractual provision at issue is still ambiguous after examining the text and its context, the second step "is to examine extrinsic evidence of the contracting parties' intent." *Yogman*, 325 Or. at 363. In determining whether an ambiguity exists, the court may consider parol and other extrinsic evidence. *Moon*, 140 Or. App. at 407; *see also Adams v. Knoth*, 102 Or. App. 238, 243-44, 794 P.2d 796 (1990) ("in deciding if the language of a contract is ambiguous, it is proper for the court to consider extrinsic evidence regarding the circumstances under which the agreement was made or to which it relates."). The parties' "practical construction of an agreement may hint at their intention." *Yogman*, 325 Or. at 364.

If the first two analytical steps have not resolved the ambiguity, the court proceeds to the third and final analytical step: the use of "appropriate maxims of construction." *Id.* Presumably, if the language is still ambiguous, then what the parties intended by that language is to be decided by the trier of fact. *See Oregon Sch. Employees Assn v. Rainier Sch. Dist No. 13*, 311 Or. 188, 194, 808 P.2d 83 (1991) ("If contract terms are ambiguous, then the trier of fact is to ascertain the intent of the parties and construe the contract consistently with their intent.").

4. Considering the text of the Lease as recited in Paragraphs 21 and 22 of the Amended Findings of Fact in the context of the document as a whole, I conclude as follows:

a. "Predecessors-in-Interest":

(1) The term "predecessors-in-interest" in Section 13.a. is subject to more than one logical interpretation and is, therefore, ambiguous. It can plausibly be construed to include Sawyers and GAF, or be construed, as commonly understood, to exclude Sawyers and GAF. See Amended Finding No. 2.

(2) Turning to the extrinsic evidence of the parties' intent (See Amending Finding Nos. 23 and 24.), Cascade's rejection of the proposed language changes shows their intent to include GAF and Sawyers. The contemporaneous writings of the parties and the testimony and narrative statements of Mr. Kennedy and Mr. Wesolowski show View-Master's intent to exclude GAF and Sawyers. I conclude that the parties did not have a meeting of the minds concerning the meaning of the term "predecessors-in-interest," View-Master merely feared that the language might be interpreted to include GAF and Sawyers.

(3) In ascertaining the intent of the parties, the following factors appear relevant:

(a) GAF and Sawyers were prior owners of the Property, who also operated the toy manufacturing business. They had no privity with View-Master. View-Master International Group, Inc. had previously owned the Property and operated the business, and was a "predecessor-in-interest" to View-Master Ideal Group, the Tenant at the time of the lease negotiations;

(b) The exception in Section 13.a., limiting View-Master's liability to the extent it is in compliance with applicable environmental laws, would not be necessary if "predecessors-in-interest" does not refer to GAF and Sawyers since View-Master could not otherwise be liable for conditions existing prior to 1981;

(c) "Predecessors-in-interest" is written in the plural, not the singular; and

(d) The Lease, as a whole, is clearly written to impose broad liability on View-Master for environmental cleanup costs:

Therefore; weighing the foregoing factors, I conclude that the term "predecessors-in-interest in Section 13.a. must refer to GAF and Sawyers.

b. Repairs/Maintenance Sections 8.a. and 20 must be read together. Mattel assumed all repair and maintenance obligations, with all such repairs to be in quality and class equal to the original work or installations. This obligation is in no way diminished by the terms of Section 20. However, nothing in the Lease requires Mattel to build new buildings, to bring existing buildings up to current code requirements, or to retrofit the buildings to comply with the accessibility requirements of the American with Disabilities Act ("ADA").

c. Indemnification: The term "predecessors-in-interest," as used in Section 13.a., includes Sawyers and GAF. See above. Mattel agreed to a comprehensive indemnification of Hall Street, including for occurrences prior to the original lease. The only exception arises when Mattel, Tyco, and View-Master (i.e., not including Sawyers and GAF) have been in compliance with applicable environmental laws and have not directly or indirectly contributed to the presence or use of the particular hazardous waste. This exception applies to both the cleanup of hazardous wastes and to any other liability, damages, or expenses.

d. Environmental: In addition to the indemnification clause, Section 13.a., Mattel agreed in Section 12.b. to assume all liability for the use or presence of hazardous wastes irrespective of when the use occurred. This liability is not limited to "predecessors-in-interest." However, the same exception applies.

e. Causation: Causation only applies if the exceptions in Sections 12.c. and 13.a. apply. Otherwise, there is no requirement in the Lease that there be actual causation

of loss. The "to the extent" language of the exceptions in Sections 12.c. and 13.a. does not add a causation element. As Judge Jones stated: "The lease is written to simply impose broad liability on Mattel for environmental cleanup costs, an obligation it can avoid only if it complies with all applicable environmental laws."

f. Quiet Enjoyment: There is no evidence that Hall Street breached Mattel's right to the peaceful and quiet enjoyment of the Property pursuant to Section 33.h. Mattel was in a better position than Hall Street to know the condition of the property and it would be inconsistent with the broad indemnity requirements of the Lease to say that the presence of hazardous wastes was a breach of quiet enjoyment.

Environmental Issues

5. "Applicable environmental laws": Judge Jones determined that "Mattel's failure to test the water for contaminants was in fact a violation of 'applicable environmental laws' within the meaning of the lease." Specifically, Mattel violated Oregon's Drinking Water Quality Act by failing to test the well water for contaminants. Therefore, the exceptions in Sections 12.c. and 13.a. do not apply.

6. TCE: Mattel is liable for the TCE contamination to the shallow soil and shallow groundwater on the Property pursuant to Section 12.b. However, no current or future remediation or special conditions are necessary, except in the GAF/Sawyers drainfield area, which includes Buildings 800/900 and 1100/1150. Because the DEQ conducted a risk assessment, no further site characterization and investigation is necessary. Because the risk in the drainfield area is limited to trench workers who may be exposed to shallow groundwater, damages would only be incurred if future excavations will occur. Hall Street offered no future development plans,

yet calculated damages based upon below grade construction requiring a dewatering system over a 30-year period. Some future development is likely, but not below grade construction. Dewatering is necessary only to protect trench workers. Therefore, damages are limited to $9,000.00.

7. TPH: Mattel is liable for the TPH contamination under Buildings 400 and 800/900. Although this contamination poses no immediate risk and remediation is only required if the buildings are removed, it must eventually be cleaned up. Mattel is only responsible for remediation costs and not for any demolition or restoration costs since the cleanup is not required until the buildings are removed. The cost of excavating, hauling, and disposing of this soil and concrete is not "in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street," i.e., $130,000.00.

8. Water Rights: The permanent shutdown of the well due to TCE contamination of the deep aquifer has resulted in the loss of the use of the well. Mattel is liable for this loss. Hall Street's argument that the proper measure of damages is the cost of acquiring substitute water is rejected because Hall Street can pass on the costs of water to its tenants. The proper measure of damages is one of the following: (a) the diminution in value of the Property due to the loss of water rights; (b) the diminution in lease value due to tenants having to acquire water; or (c) the value of those water rights if Hall Street could sell them. Since Hall Street's water rights were non-transferable and no evidence was presented regarding diminution in value, Hall Street has failed to meet its burden to establish these damages to a reasonable certainty. However, because Hall Street has suffered some damages, nominal damages of $10,000.00 are awarded.

9. Expenses: Mattel is liable for the expenses incurred and which will be incurred in the future by Hall Street in relation to the DEQ proceeding relating to the deep aquifer

contamination by TCE, for environmental consulting services performed by Dames & Moore in the sum of $143,630.52, and for legal services rendered by Short, Cressman and Burgess in connection with environmental issues on the Property in the sum of $216,036.59. These expenses primarily relate to TCE contamination for which Mattel is responsible.

Repair Issues

10. Mattel met its repair and maintenance obligations under Sections 8a and 20 prior to vacating the Property on May 31, 2001.

11. The Lease did not require Mattel to upgrade the facility beyond what was required during its leasehold interest, since such upgrades would clearly be in "quality and class" greater than the original works. Oregon statutes explicitly do not require buildings to upgrade to newer requirements so long as the same occupancy is being continued. Uniform Building Code § 1101.5, 3401; Oregon Electrical Specialty Code, Chapter 27.01.040; see also Prudential Insurance, 68 F.3d at 372-74.

12. Therefore, since none of the required repairs involved substantial alterations to the buildings on the Property, Mattel was not required to bring the buildings up to current code standards or to bring the buildings into compliance with the accessibility requirements of the American with Disabilities Act.

13. The only evidence is that the leak in the roof over Building 800 developed after May 31, 2001.

Indemnity from Third-Party Lawsuits

14. Hall Street is entitled to indemnification from Mattel for the third-party lawsuits in the total sum of $75,304.49 since these claims all related to TCE contamination.

15. Mattel's liability is not limited by the allocation provisions of Section 13.a. There are no other "tenants" to allocate defense costs to. GAF and Sawyers are former owners.

16. The "exclusive remedy" defense is not available to Mattel. Mattel was not an employer and Mattel is contractually liable for these costs pursuant to the Lease.

17. Hall Street's failure to test the water prior to 1998 does not result in a reduction in Mattel's liability for these defense costs since Mattel agreed to indemnify Hall Street for these costs.

CONCLUSION

Based on the foregoing, the ultimate issues are answered as follows:

A. The repairs and maintenance that Mattel performed prior to May 31, 2001, satisfied its repair and maintenance obligations under the Lease.

B. Mattel is obligated to pay to Hall Street, in connection with litigation brought by third parties, the sum of $75,304.49.

C. Hall Street has not suffered any compensable losses for TPH contamination in excess of the amount of $130,000.00 previously offered to Hall Street by Mattel, and Mattel is obligated to pay to Hall Street the sum of $130,000.00.

D. Mattel is obligated to pay Hall Street the sum of $9,000.00 for TCE contamination to shallow soils and shallow groundwater.

E. Hall Street has failed to prove the amount of its damages with respect to the loss of the right to withdraw water from under the property, and is awarded nominal damages of $10,000.00.

F. Mattel is obligated to reimburse Hall Street for expenses incurred relating to the DEQ proceeding for environmental consulting services performed by Dames & Moore in the sum of $143,630.52 and for legal services rendered by Short, Cressman and Burgess in the sum of $216,036.59.

G. Mattel shall indemnify Hall Street for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the Property.

IT IS THEREFORE the Order of the Arbitrator, pursuant to the Arbitration Agreement between the parties:

1. Hall Street is awarded judgment against Mattel, Inc. in the sum of $583,971.60.

2. Hall Street is awarded declaratory judgment against Mattel, Inc. for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the Property.

3. Hall Street and Mattel are directed to submit simultaneous briefs concerning the prevailing party issue by September 20, 2002. Oral argument is set for September 27, 2002, at 9:00 a.m. concerning the prevailing party issue.

DATED this 3rd day of September, 2002.

/s/ Larry T. Coady
LARRY T. COADY
Arbitrator

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

OPINION AND ORDER

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JONES, Judge:

When this case was last before me, I reversed the arbitrator's decision and remanded for further proceedings. See Hall Street Associate& L.L.C. v. Mattel Inc., et al., No. CV-00-355, slip op. (D. Or. Apr. 29, 2002) ("April Opinion" or "Hall Street I"). On remand, the arbitrator designated plaintiff Hall Street Associates, LLC ("Hall Street") the prevailing party, awarded Hall Street judgment plus costs and attorneys' fees, and entered a declaratory judgment in Hall Street's favor. Both Hall Street and Mattel, Inc., et al., ("Mattel") filed motions (# 90, # 92) for review and modification of the arbitration award.

As discussed below, Hall Street's motion (#90) is denied, and Mattel's motion (# 92) is granted in part and denied in part. Because my resolution of the motions does not require further action by the arbitrator, the arbitration award is adopted in part and reversed in part, and judgment is entered accordingly.

BACKGROUND

The background of this case is set forth in this court's Opinion and Order issued in April 2002. See Hall Street I, at 2-8. In the April Opinion, I reversed the arbitrator's conclusion that Mattel's failure to test the water for contaminants did not constitute a violation of "applicable environmental laws" under the lease. See Hall Street I, at 16. I also instructed the arbitrator to determine whether the parties intended the term "predecessors-in-interest" to apply to GAF and Sawyers, the prior occupants of the property. See Hall Street I, at 19-20.

In September 2002, after briefing and oral argument, the arbitrator issued Amended Findings of Fact and Conclusions of Law. See Arbitrator's Amended Findings of Fact and Conclusions of Law, Sept. 3, 2002 ("FF/CL 9/3/02"). The arbitrator concluded that the term "predecessors-in-interest"

in Section 13(a) of the lease is ambiguous because it plausibly could be interpreted as either referring to GAF and Sawyers, or not referring to them. See FF/CL 9/3/02 at 18. When an examination of the extrinsic evidence did not resolve the ambiguity, the arbitrator found that the parties must have intended the term to apply to GAF and Sawyers, because the exceptions to liability in Section 13(a) would not otherwise be necessary, because the term is plural, and because the lease is written to impose broad liability on the tenant. See FF/CL 9/3/02 at 19.

The arbitrator awarded Hall Street the following damages: $9,000 for the dewatering necessary to protect trench workers who might be exposed to contaminated groundwater, $130,000 for the cost of excavating, hauling and disposing of contaminated soil and concrete; $10,000 in nominal damages for the loss of Hall Street's water supply; $143,630.52 for consulting services performed by Dames & Moore; $216,036.59 for legal services rendered by Short, Cressman and Burgess ("Short Cressman") related to Department Of Environmental Quality ("DEQ") proceedings; and $75,304.49 for Hall Street's legal costs in defending third-party lawsuits related to trichloroethene ("TCE") contamination. See FF/CL 9/3/02 at 21-23. The arbitrator also required Mattel to indemnify Hall Street for all future costs that Hall Street may be required to pay the DEQ or may incur in complying with a decree or order from the DEQ. See FF/CL 9/3/02 at 24.

In October 2002, the arbitrator issued Findings of Fact and Conclusions of Law designating Hall Street the "prevailing party" under Section 24 of the lease, and directing Hall Street to submit its claim for attorneys' fees and costs. See Arbitrator's Findings of Fact and Conclusions of Law, Oct. 2, 2002, at 3 ("FF/CL 10/2/02"). Later in October 2002, the arbitrator awarded Hall Street $248,684.67 in attorneys' fees, and $85,629.99 in costs and expenses. See Arbitrator's Findings of Fact and Conclusions of Law, Oct. 28, 2002, at

2-3 ("FF/CL 10/28/02"). The arbitrator awarded Hall Street post-judgment interest at the state statutory rate of nine percent from the date the arbitration award was signed until paid. *See* FF/CL 10/28/02 at 4.

In November 2002, the arbitrator issued his Final Arbitration Award for judgment for Hall Street of $484,031.12, attorneys' fees of $252,065.32, and costs of $74,011.05, with interest on the entire amount of nine percent from the date of the arbitration award until paid.[1] See Arbitrator's Final Arbitration Award, Nov. 19, 2002, at 2 ("Final Award"). The Final Award also granted Hall Street declaratory relief for futures costs Hall Street may be required to pay DEQ or may incur due to a DEQ consent decree or order. See Final Award at 2.

STANDARD OF REVIEW

The April Opinion fully discussed the standard of review. *See Hall Street I*, at 8-9. In short, the parties drafted an arbitration agreement setting the standard of review: "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *See Hall Street I*, at 8-9.

DISCUSSION

1. Hall Street's motion to modify the arbitration award.

Hall Street argues that the arbitration award contains three errors: (1) the improper measure of damages for Hall Street's contaminated water supply; (2) the omission of late fees and

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[1] In the Final Arbitration Award the arbitrator corrected "certain inadvertent errors" that had occurred in the prior calculations, and entered the correct amount of damages and attorneys' fees and costs. See Arbitrator's Final Arbitration Award, Nov. 19, 2002, at 1-2 ("Final Award"). Neither party objected to the variance between the initial award and Final Award, and I adopt the amounts stated in the Final Award.

prejudgment interest and an incorrect post-judgment interest rate; and (3) an overly-narrow award of declaratory relief that does not encompass potential third-party lawsuits.

A. The measure of damages for Hall Street's lost water supply.

Hall Street argues that the arbitrator erred in concluding that Hall Street had not established damages for the TCE contamination of the deep aquifer. Under the "cost of replacement" measure of damages, Hall Street argues that it proved the present value of its water supply to be $8.2 million and should have been awarded that amount.

The arbitrator stated that "[t]he permanent shutdown of the well due to TCE contamination of the deep aquifer has resulted in the loss of the use of the welL Mattel is liable for this loss." FF/CL 9/3/02 at 21. The arbitrator rejected Hall Street's argument that the proper measure of damages is the cost of acquiring substitute water, concluding that Hall Street could pass on the costs of the water to its tenants. See FF/CL 9/3/02 at 21-22. The arbitrator stated that damages should be measured as either the diminution of the property value, the diminution of the lease value, or the value of water rights if Hall Street could sell them. See FF/CL 9/3/02 at 22. Because the water rights are non-transferable, and because Hall Street presented no evidence regarding the diminution in value of either the property or the lease value, the arbitrator found that Hall Street had not met its burden of establishing damages to a reasonable certainty. See FF/CL 9/3/02 at 22.

My analysis is two-fold: first I must determine the measure of damages, then I must review for error the arbitrator's conclusion that Hall Street did not present substantial evidence. The Oregon Supreme Court has stated that "[a] permanent injury to land justifies an award of damages measured by the resulting diminution in the value of the property." Hudson v. Peavey Oil Co., 279 Or. 3, 10, 566 P.2d

175 (1977); accord Millers Mut. Fire Ins. Co. v. Wildish Constr. Co., 306 Or. 102, 117, 758 P.2d 836 (1988) (en banc) ("[T]his court has generally held that when the injury to real property was permanent, the damages were measured by the difference in value immediately before and immediately after the injury or the diminution-in-value rule."). Conversely, "[t]emporary injury, or injury which is reasonably susceptible of repair, justifies damages measured by the loss of use or rental value during the period of the injury, or the cost of restoration, or both, depending on the circumstances." Hudson, 279 Or. at 10; Millers, 306 Or. at 117. To constitute a permanent injury to real property, the injury "need not be permanent in the sense that it will last forever in order to justify the use of the diminution of value measure of damages," but it must be likely to persist for a reasonable period of time such that the property's value is significantly affected. See Hudson, 279 Or. at 10-11.

The "cost of replacement" measure of damages is used where there is injury to a structure or an improvement to the land. In Oregon Mut. Ins. Co. v. Mathis, 215 Or. 218, 334 P.2d 186 (1959), the Oregon Supreme Court cited McCormick on Damages for the rule that "if the improvement is destroyed, and may readily be treated as a unit in itself, apart from the land, as in the case of a house or other building, the value of the improvement itself at the time of its destruction is usually taken as the basis of compensation, and, in ascertaining this value, the original cost or the cost of replacement, with allowance for depreciation, may be considered." 215 Or. at 220. In Millers, the Oregon Supreme Court applied the rule from Mathis to conclude that, because the plaintiffs "have treated their house 'as a unit in itself, apart from the land[,]' [w]e hold that the value of a house at the time of its destruction is the proper measure of damages." See Millers, 306 Or. at 125. The court in Millers stated that its result was "exactly the same" as the "only other case we have in which the building was totally destroyed." 306 Or. at 126.

Hall Street analogizes to Millers by arguing that the water supply is capable of valuation separate and apart from the real property, and argues that damages should be measured by the reasonable cost of replacing the water supply. I disagree, and conclude that the "cost of replacement" measure of damages is inapplicable because Hall Street never treated the water supply as a "unit in itself, apart from the land," and because the discarded TCE injured the property, not a structure or improvement made to the property. The TCE contamination of the water supply constitutes a permanent injury to the property, triggering the "diminution in value" measure of damages. Thus, to recover for the contaminated water supply, Hall Street needed to present evidence of the difference between the value of the property with the water supply and the value of the property without the water supply. The arbitrator found that Hall Street had not presented substantial evidence of the diminution in value of the property. I find no error in the arbitrator's application of the "diminution in value" measure of damages or the finding that Hall Street did not present substantial evidence of its damages.

B. Prejudgment interest and late fees, and modification of the post-judgment interest rate.

Hall Street makes three arguments regarding the pre and post-judgment interest rates. First, Hall Street argues that the arbitrator erred by not awarding prejudgment interest and a late fee on the award of damages. Hall Street cites Sections 4 and 16(b) of the lease as requiring a prejudgment interest rate of eighteen percent and a five percent late fee on any sum payable. Second, Hall Street argues that the arbitrator should have awarded prejudgment interest on the attorneys' fees and costs in accordance with Section 24. Third, Hall Street argues that Sections 4 and 16(b) set the post-judgment interest rate at eighteen percent. Mattel contends that interest should begin to accrue on the date judgment is entered, and that the federal

post-judgment interest rate applies in this case, rather than the state statutory rate.

Under ORS 82.010(1)(c), interest is payable on "[a]ll moneys after they become due . . . ." The Oregon Supreme Court has held that "interest on unliquidated damages for breach of contract is proper, where (1) the exact amount of damages is either ascertained or readily ascertainable, and (2) the time from which the interest runs is easily ascertained." Krieg v. Union Pac. Land Resources Corp., 269 Or. 221, 234, 525 P.2d 48 (1974) (citing Public Market Co. v. Portland, 171 Or. 522, 130 P.2d 624 (1943)); accord Miller v. Meisel Co., Inc., 183 Or. App. 148, 181, 51 P.3d 650 (2002). In determining whether damages are ascertainable, "[t]he facts that defendant disputed any liability and that the jury did not award plaintiff all the damages that it sought are insufficient grounds to deny prejudgment interest." Banister Cont'l Corp. v. Northwest Pipeline, Corp., 76 Or. App. 282, 293, 709 P.2d 1103 (1985), vacated on other grounds 301 Or. 763, 724 P.2d 822 (1986); accord Strader v. Grange Mut. Ins. Co., 179 Or. App. 329, 339, 39 P.2d 903 (2002) ("Since Banister, we have repeatedly reaffirmed its holding, despite the fact that the Supreme Court vacated our opinion on unrelated grounds."). The Oregon courts have stated it is "well settled" that prejudgment interest is proper even where damages are not ascertainable until issues of fact are decided. See Strader, 179 Or. App. at 339; Miller, 183 Or. App. at 182. To find the date when interest begins to accrue, Oregon courts examine the record for evidence of when the damage occurred. See Miller, 183 Or. App. at 181 (finding that the record established "one possible date" when damages occurred); Klokke Corp. v. Classic Exposition, Inc., 139 Or. App. 399, 410-11, 912 P.2d 929 (1996) (finding that nothing in the record showed when each portion of damages accrued; concluding that no basis for determining when damages became ascertainable).

Here, the arbitrator concluded that "Hall Street is not entitled to prejudgment interest on its award. Damages were not readily ascertainable and liability was not clear." FF/CL 10/28/02 at 3. The arbitrator awarded Hall Street "interest on the entire amount at the rate of 9% from the date of this Arbitration Award until paid," and set the due-date for damages as thirty days after this court enters judgment. Final Award at 2. I construe the arbitrator's decision that interest begins to accrue from the date of the arbitration award, prior to the date this court enters judgment, to be a limited award of prejudgment interest, and review it as such.

Under Oregon law, once the arbitrator's findings of fact and conclusions of law made damages ascertainable, prejudgment interest should have been awarded. See Strader, 179 Or. App. at 339. The first readily ascertainable date from which interest should begin to accrue is the date of the arbitration award, because the damages occurred over a substantial, indefinite period of time and the award includes amounts for future remediation. See Klokke, 139 Or. App. at 410-11; cf. Miller, 183 Or. App. at 181 ("[a]s to the date on which interest would begin to accrue, the record contains only one possible date"); Strader, 179 Or. App. at 338 ("Defendant does not argue that the trial court chose the wrong date or that the date is not ascertainable."). The arbitrator's award of prejudgment interest from the date of the arbitration award is, therefore, consistent with Oregon law.

Hall Street also requests prejudgment interest on the attorneys' fees and costs under the last clause of Section 24, which states "attorneys' fees, costs and expenses shall be deemed to have accrued on the commencement of such action." See Mattel's Arbitration Ex. 102 at 23 ("1991 Lease") (emphasis added). Hall Street cites Sections 4 and 16(b) of the lease as the bases for awarding prejudgment interest. The arbitrator awarded Hall Street its reasonable attorneys' fees, costs and expenses pursuant to Section 24 of

the Lease, but declined to award prejudgment interest on attorneys' fees and costs, finding that the last clause of Section 24 was "clearly intended to allow for attorneys' fees, costs and expenses incurred prior to the commencement of the litigation and is not a basis for interest and late fees on such fees and costs from the date of commencement of litigation." FF/CL 10/28/02 at 2.

I tend to agree with Hall Street that the last clause of Section 24 appears to provide for the computation of interest on attorneys' fees from the outset of litigation, however, Hall Street's reliance on Sections 4 and 16(b) is misplaced. I find Sections 4 and 16(b) to be inapplicable penalty provisions, see below, and do not interpret Section 24, standing alone, as providing for prejudgment interest.[2] Because I find that Hall Street is only entitled to post-judgment interest on attorneys' fees and costs, I reverse the arbitrator's award of interest on attorneys' fees and costs between the date of the arbitration award and the date judgment is entered.

Hall Street argues that Sections 4 and 16(b) require an eighteen percent interest rate and a five percent late fee on both pre and post-judgment interest. Section 4 states that the five percent late fee applies to amounts "not paid by the fifteenth (15th) day of the month" and the eighteen percent interest rate applies to "delinquent Rent or other sums payable . . . calculated from the original due date." 1991 Lease at 4. Likewise, Section 16(b) states that "delinquent Rent or other amounts due under the Lease shall bear interest at the rate of 18% per annum from the date due until paid . . . ." 1991 Lease at 18. I interpret Sections 4 and 16(b) as

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[2] I note that Oregon statutes and cases do not appear to provide for prejudgment interest on attorneys' fees and costs, had Hall Street relied on them. See ORS 82.010(2)(d) ("Interest . . . shall also accrue on attorney fees and costs entered as part of the judgment"); Miller v. Meisel, 183 Or. App. 148, 181, 51 P.3d 650 (2002) (stating that prejudgment interest on unliquidated damages for breach of contract is proper).

penalty provisions that apply to amounts overdue under the lease. No provision of the lease imposes a due-date for amounts awarded under the indemnity provision, and the arbitration award expressly set the due-date for Mattel to pay the arbitration award as thirty days from the date this court enters judgment. Therefore, I conclude that the penalty provisions in Sections 4 and 16(b) are only applicable to delinquent amounts due under the lease, and have no application to the pre or post-judgment interest rate.[3]

Mattel argues that the arbitrator incorrectly applied the nine percent state statutory interest rate instead of the six percent federal statutory interest rate. At oral argument, the parties agreed that if the contractual interest rate was not applicable, the federal statutory post-judgment interest rate of six percent would apply. I agree with the parties and modify the post-judgment interest rate accordingly. See 28 U.S.C. § 1961(a). However, the state statutory interest rate applies to the arbitrator's award of prejudgment interest front the date of the arbitration award until judgment is entered. See In re Niles, 106 F.3d 1456, 1463 (9th Cir. 1997) (stating that because debt "arose under state law, the award of prejudgment interest is also governed by state law" (internal citation omitted)).

In sum, Hall Street is awarded prejudgment interest on its damages with interest to accrue from the date of the arbitration award, and post-judgment interest on its damages and attorneys' fees and costs with interest to accrue from the date this court enters judgment. The state statutory interest rate of nine percent applies to the award of prejudgment interest, and the federal statutory rate of six percent applies to the award of post-judgment interest.

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[3] I leave open the question of whether the penalty provisions will apply if Mattel does not pay the arbitration award within thirty days from the date this court enters judgment.

C. Expanding the declaratory relief.

Hall Street argues that the arbitrator's award of declaratory judgment against Mattel should be expanded to cover all costs that Hall Street may incur as a result of the TCE contamination on the property. Hall Street requests that the declaratory judgment be amended as follows:

> "Mattel must assume liability for all future losses, costs, damages, expenses or liabilities incurred by Hall Street directly or indirectly resulting from the TCE contamination, including without limitation any amounts Hall Street may be required to pay to DEQ or expend as a result of a DEQ consent authorities (including, without limitation, the U.S. Environmental Protection Agency and the City of Beaverton), adjacent landowners or other third parties who may assert claims against Hall Street regarding TCE contamination."

Hall Street Mem. in Supp. at 14-15. The arbitrator awarded Hall Street declaratory judgment against Mattel for "all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the property." FF/CL 9/3/02 at 24. Both my April Opinion and the arbitration award found that the lease imposed broad liability on the tenant for any environmental damage to the property. The arbitration award also required Mattel to indemnify Hall Street for the costs of third-party lawsuits related to TCE contamination, which I have upheld.

While I see no reason why Mattel would not be liable for future third-party lawsuits related to TCE contamination, I decline to expand the declaratory relief to include potential third-party lawsuits because Hall Street has not demonstrated that the arbitrator's award of declaratory relief was erroneously narrow.

2. Mattel's motion to modify the arbitration award.

Mattel contests three aspects of the arbitration award: (1) the interpretation of the term "predecessors-in-interest"; (2) the conclusion that the exceptions to liability in Sections 12 and 13(a) are inapplicable; and (3) the calculation of damages.

A. The term "predecessors-in-interest".

In the April Opinion, I reversed the arbitrator's conclusion that, although the term "predecessors-in-interest" in Section 13 included GAF and Sawyers, the exceptions to liability applied because Mattel had complied with "applicable environmental laws." When I remanded the case, I instructed the arbitrator to develop the record as to the meaning of the term "predecessors-in-interest":

> "[I]t appears that the arbitrator did not review substantial evidence relevant to the parties' intent in construing the term predecessors-in-interest. [] Accordingly, on remand, the arbitrator shall fully develop the factual record relevant to the meaning of the term 'predecessor-in-interest' in order to ascertain the parties' intent, and reach a finding based on this thorough review of the facts in the record."

Hall Street I, at 19-20. On remand, the arbitrator found the term to be ambiguous and found that extrinsic evidence did not resolve the ambiguity. The arbitrator weighed several factors in concluding that "the term 'predecessors-in-interest' in Section 13.a. must refer to GAF and Sawyers." FF/CL 9/3/02 at 19.

Mattel objects to the arbitrator's conclusion that GAF and Sawyers are predecessors-in-interest under the lease. Mattel argues that Hall Street presented no testimony regarding the meaning of the term, and that no party understood the term to include GAF and Sawyers. Mattel also argues that, as a

matter of law, the arbitrator's conclusion that the term is ambiguous renders the contract invalid. In response, Hall Street cites a letter from View-Master's counsel to Cascade's counsel as demonstrating that View-Master fully understood the obligations it assumed by signing the lease.

In Oregon, the construction of a contract is a question of law for the court, Anderson v. Divito, 138 Or. App. 272, 277, 908 P.2d 315 (1995), with the goal being to give effect to the parties' intentions. Anderson v. Jensen Racing, Inc., 324 Or. 570, 575-76, 931 P.2d 763 (1997). In Yogman v. Parrott, 325 Or. 358, 937 P.2d 1019 (1997) (en banc), the Oregon Supreme Court laid out three steps for courts to follow when interpreting a contract provision. 325 Or. at 361. "First, the court examines the text of the disputed provision, in the context of the document as a whole." Yogman, 325 Or. at 361. In the absence of any ambiguity, the court construes the words of a contract as a matter of law and the analysis ends. Yogman, 325 Or. at 361. A contract term is unambiguous if it has only one sensible and reasonable interpretation. See D&D Co. v. Kaufman, 139 Or. App. 459, 462, 912 P.2d 411 (1996).

If ambiguity exists, the second step is for the court "to examine extrinsic evidence of the contracting parties' intent." Yogman, 325 Or. at 363, see also Webb v. National Union Fire Ins. Co., 207 F.3d 579, 582 (9th Cir. 2000) ("[T]he consensus among Oregon courts is that they are opposed to considering extrinsic evidence to determine the parties' intent unless an ambiguity is apparent from the four corners of the document"). Under ORS 42.220, the circumstances surrounding contract formation are to be considered by the court.[4] If

[4] ORS 42.270 provides in full:

> In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting.

the ambiguity is not resolved by extrinsic evidence of the parties' intent, the court proceeds to the third step: "rel[ying] on appropriate maxims of construction." See Yogman, 325 Or. at 364; Portland Fire Fighters' Ass'n v. City of Portland, 181 Or. App. 85, 91, 45 P.3d 162 (2002).

Here, the term "predecessors-in-interest" appears in Section 13(a):

> "Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liability, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its . . . predecessors-in-interest . . . occurring during or prior to the Original Lease, during this Lease, relating to discharging hazardous materials, or arising from any breach or default under the Lease by Tenant."

1991 Lease at 12-13. Section 13(a) of the lease provides that the tenant will indemnify the landlord for the acts of the tenant as well as the tenant's predecessors-in-interest. The lease states that View-Master Ideal Group, which was formerly known as View-Master International Group,[5] is referred to throughout the lease as "View-Master" or "Tenant."[6] If the terms 'View-Master" and "Tenant" were

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[5] As set out in the April Opinion, the parties to the 1991 lease at issue were View-Master Ideal Group, Inc. ("View-Master Ideal") and Cascade Square Associates ("Cascade"). View-Master Ideal was known as View-Master International prior to 1987. View-Master Ideal was acquired by Tyco in 1989, and Tyco was acquired by Mattel in 1997. Cascade became Hall Street after 1991.

[6] The introductory caption of the lease states, in relevant part:

> THIS LEASE . . . [is] between CASCADE SQUARE ASSOCIATES, a Washington partnership ("Landlord") and VIEW-MASTER IDEAL GROUP, INC, an Oregon Corporation, f/k/a [formerly known as] View-Master International Group, Inc. ("View-Master" or "Tenant"), a wholly-owned subsidiary of Tyco Toys, Inc.

1991 Lease at 1 (first alternation added).

interchangeable, as the contract states they were when it was formed, Section 13(a) requires View-Master to indemnify the landlord for View-Master's actions (meaning both View-Master International Group and View-Master Ideal Group) as well as the actions of View-Master's "predecessors-in-interest," whether or not those actions occurred during or prior to the original lease in 1985. Because View-Master could not be both the tenant and the tenant's "predecessors-in-interest," the term "predecessors-in-interest" can plausibly be read as referring to GAF and Sawyers, the parties that occupied the property before View-Master.

For the term "predecessors-in-interest" to be ambiguous, the term must be susceptible to another plausible interpretation. See D&D Co., 139 Or. App. at 462. The arbitrator found that the term "predecessors-in-interest" is ambiguous because View-Master International Group had previously owned the property and operated the business, and was a 'predecessor-in-interest' to View-Master Ideal Group. See FF/CL 9/3/02 at 2, 19. Although less plausible than the alternative interpretation, View-Master International Group could be considered a separate entity on the basis that it owned the property before Cascade and before the original lease. Moreover, the term in the indemnity provision does not refer only to the tenant's predecessors, but to the tenant's predecessors-in-interest. Thus, I agree with the arbitrator that the term is susceptible to more than one plausible interpretation, and is, therefore, ambiguous.

The next step is to examine extrinsic evidence of the parties' intent. See Yogman, 325 Or. at 363. Consistent with my instructions on remand, the arbitrator fully developed the record by examining extrinsic evidence of the parties' intent. The arbitrator considered a letter sent from View-Master's counsel to Cascade's counsel, an internal memorandum from View-Master's counsel to his client, and the narrative statements of two attorneys for View-Master. The arbitrator

found that the evidence did not resolve the ambiguity because "Cascade's rejection of the proposed language changes shows their intent to include GAF and Sawyers," while "[t]he contemporaneous writings of the parties and the testimony and narrative statements of Mr. Kennedy and Mr. Wesolowski show View-Master's intent to exclude GAF and Sawyers." FF/CL 9/3/02 at 18-19. I agree with the arbitrator that Cascade's rejection of the proposed language demonstrates its intent that the term include GAF and Sawyers. But unlike the arbitrator, I conclude that the extrinsic evidence establishes that View-Master understood the expansive indemnity obligations imposed by the term, and agreed to assume those obligations by signing the contract with the disputed term present.

One month before the contract was signed, the attorney for View-Master, Michael Kennedy, sent a letter to the attorney for Cascade, Robert Hibbs, stating:

> "First, the present language (of your draft) of Paragraph 13(a) obligates Tenant (View-Master) and therefore Guarantor (Tyco) to indemnify the Landlord from acts of third-party 'predecessors-in-interest' including acts occurring 'prior to the Original Lease'.
>
> We are very concerned at being asked to assume this responsibility. While we have no difficulty at all in agreeing to indemnify Landlord from all acts of View-Master occurring during the original lease, and thereafter, it is the prospect of indemnifying Landlord from acts of GAF, Sawyer's or others which is unfair. This is a broad burden which is not mitigated by other language provisions of the lease[.]
>
> Under the current lease language, View-Master had no such broad responsibility; it seems as if Landlord is securing both a better credit (Tyco) as well as much broader protection than in the prior lease.

> Accordingly, we are again seeking the deletion of the words 'predecessor-in-interest' at lines 6 and 10 of Paragraph 13(a), and also deletion of the words 'or prior to' at line 12 of the same paragraph."

Mattel Arb. Ex. 162 at 1-2 (emphasis added). Kennedy's letter unequivocally demonstrates that, at that time View-Master interpreted the language of Section 13(a) as imposing indemnity obligations for the acts of third-party predecessors-in-interest. The letter also identifies GAF and Sawyers as the third-party predecessors-in-interest that View-Master preferred not to indemnify. To eliminate View-Master's liability for GAF and Sawyers, Kennedy's letter requested that the words "predecessors-in-interest" and "or prior to" be deleted from the lease. According to an internal memorandum written by Kennedy the day after he wrote the letter, the terms were not deleted but new language was added to limit View-Master's liability:

> "While not adopting our proposed language changes, he suggested new language effectively limiting our liability to damages actually caused by the conduct of VMIG.
>
> The result is that no damages for PCB's asbestos, hazardous waste or 'other damage' caused exclusively by predecessors-in-interest would be our responsibility."

Mattel Arb. Ex. 163 (no emphasis added). Because at the time of Kennedy's letter both parties understood that Section 13(a) obligated View-Master to indemnify the landlord for the acts of GAF and Sawyers, the "new language effectively limiting [] liability" must be examined to determine if the parties' understanding of Section 13(a) changed.

Kennedy's narrative statement explains that he "negotiated, and Plaintiff agreed, to add and expand upon two provisions that would not make Tyco responsible for guaranteeing the actions of GAF or its (GAF's) predecessors." Mattel App. at 50 (narrative statement). The first addition was that the

landlord must seek fair and reasonable allocation of defense costs based on tenant's actual contribution to the damages which are the subject of the suit. Mattel App. at 50. The addition of a requirement that the landlord seek contribution in no way clouds the parties' previous understanding that the term "predecessors-in-interest" applied to GAF and Sawyers, and, in fact, presumes liability by requiring the landlord to involve other parties. Kennedy's narrative statement explains the second addition as being that "Tenant would not be held liable following expiration of the Lease for PCB, asbestos, hazardous waste, and other liability that was not caused directly or indirectly by Tenant or its corporate predecessor-in-interest, View-Master Industrial [sic] Group, Inc," Mattel App. at 50. The added language expands the exceptions to liability that appear in 13(a)(i)-(iv), but does not alter View-Master's indemnity obligation as it stood at the time of Kennedy's letter if the exceptions did not apply.

In conclusion, while I am certain that View-Master was "exceedingly reluctant" about indemnifying Cascade for the actions of GAF and Sawyers, and that View-Master believed it was adequately protected from liability by the exceptions and the contribution provision, I find that, as a matter of law, the extrinsic evidence establishes that both Cascade and View-Master understood and intended the term "predecessors-in-interest" to apply to GAF and Sawyer.[7]

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[7] Mattel argues that it defies common sense that a tenant as experienced as View-Master and Tyco would agree to such broad indemnity provisions. On that subject, I find the difference between Michael Kennedy's narrative statement and Dennis Wesolowski's narrative statement to be noteworthy because both attorneys were involved in the lease negotiations on behalf of View-Master. Wesolowski's narrative statement states that Tyco "would not sign a lease with such an inequitable condition since GAF or its predecessors were unrelated third parties with no corporate relationship to Tyco." Mattel's App. at 53 (emphasis added). In contrast, Kennedy's narrative statement states that "Tyco was exceedingly reluctant to guarantee a lease with such an inequitable condition

B. Application of the indemnity exceptions in Sections 12 and 13.

Mattel argues that the arbitrator erred in not applying the exceptions to indemnity in Sections 12 and 13. Mattel also argues that the language "to the extent" preceding the phrase "applicable environmental laws" has the operative effect of requiring some cause-and-effect relationship. Hall Street responds that the April Opinion forecloses both of Mattel's arguments, and I agree.

The April Opinion concluded that "[t]he two exceptions to this liability, found in sections 12(c) and 13 of the lease, freed the tenant from liability only if it was in compliance with all 'applicable environmental laws.'" Hall Street I, at 16 (no emphasis added). Because Mattel's failure to test the water for contaminants violated the Oregon Drinking Water Quality Act, "the arbitrator erred as a matter of law in concluding that Mattel's failure to test for contaminants did not constitute a violation of applicable environmental laws." Hall Street I, at 18. The April Opinion also rejected Mattel's present argument that a causation requirement exists within the exceptions to liability, stating "there is no requirement in the lease that there be actual causation of loss. The lease is written to simply impose broad liability on Mattel for environmental cleanup costs, an obligation that it can avoid only if it complies with all applicable environmental laws." Hall Street I, at 18.

The arbitrator considered Mattel's arguments regarding the exceptions to liability and the causation requirement in light of the April Opinion:

> "[T]here is no requirement in the Lease that there be actual causation of loss. The 'to the extent' language of

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since GAF or its predecessors were unrelated third parties with no corporate relationship to Tyco." Mattel's App. at 49 (emphasis added).

> the exceptions in Sections 12.c. and 13.a. does not add a causation element.
>
> * * *
>
> "'Applicable environmental laws': Judge Jones determined that 'Mattel's failure to test the water for contaminants was in fact a violation of "applicable environmental laws" within the meaning of the lease.' Specifically, Mattel violated Oregon's Drinking Water Quality Act by failing to test the well water for contaminants. Therefore, the exceptions in Sections 12.c. and 13.a. do not apply."

FF/CL 9/3/02 at 20, 21. The arbitrator's conclusions are in accordance with my April Opinion, and I find no error.

C. Damages and attorneys' fees and costs.

Mattel contests most of the damages awarded to Hall Street, as well as the post-judgment interest rate. I have carefully considered all of Mattel's objections and conclude that the award of damages and the award of attorneys' fees and costs are supported by substantial evidence and not erroneous.

i. Speculative future losses.

Mattel states that damages must be proven to a reasonable certainty, and that damages under an indemnity provision do not arise until an actual loss is incurred or liability is fixed. Mattel argues that, except for the $128,000 awarded for DEQ costs, Hall Street had not incurred the damages awarded by the arbitrator. Hall Street responds by arguing that Mattel has not cited the damages allegedly based on speculative future losses.

I agree with Mattel that damages must be proven with reasonable certainty, but, like Hall Street, am unclear as to the specific aspects of the arbitration award that Mattel challenges. Insofar as Mattel is challenging the award of

$130,000, the arbitrator found that Mattel is liable for petroleum hydrocarbons ("TPH") contamination and that the "cost of excavating, hauling, and disposing of this soil and concrete is not 'in excess of the amount reflected in the estimate for this work that Mattel has previously offered to pay to Hall Street,' i.e., 130,000." FF/CL 9/3/02 at 21. Insofar as Mattel is challenging the award of $9,000 for TCE contamination to shallow soils and shallow groundwater, the arbitrator stated that "Mattel presented evidence that only the sum of $9,000 need be expended to provide dewatering to protect trench workers." FF/CL 9/3/02 at 12, 21. Both awards were based on damage to the property for which Mattel assumed liability under the lease, and both amounts awarded by the arbitrator were proposed by Mattel.

ii. $10.000 in nominal damages for the lost water supply.

Mattel argues that the arbitrator erred in awarding Hall Street $10,000 in nominal damages for the loss of its water supply. In support, Mattel cites an Oregon Supreme Court case stating that "an award of $100 is more than nominal damages." Baden v. Sunset Fuel Co., 225 Or. 116, 118, 357 P.2d 410 (1960). In response, Hall Street cites an Oregon Supreme Court stating that "the term 'nominal' as applied to damages is a relative term and will frequently vary according to the circumstances of each case. What may be substantial damages in one case may be held nominal under other circumstances." Frazee v. Brazda, 239 Or. 624, 627, 399 P.2d 346 (1965).

Although the arbitrator concluded that Mattel is liable for Hall Street's lost water supply, the arbitrator stated that "Hall Street has failed to meet its burden to establish these damages to a reasonable certainty." FF/CL 9/3/02 at 22. Regardless, the arbitrator found that, "because Hall Street has suffered some damages, nominal damages of $10,000 are awarded." FF/CL 9/3/02 at 22. I agree with the arbitrator that Mattel is liable for the contaminated water supply, and I agree that Hall

Street suffered some damages. In the context of this case, I find the award of $10,000 in nominal damages not to be erroneous.

iii. Hall Street as the prevailing party.

Mattel argues that Hall Street was not the prevailing party, much less the lone prevailing party, because Mattel prevailed on the majority of Hall Street's claims. Mattel also argues that, even assuming Hall Street was the prevailing party, the arbitrator should have further reduced the award of attorneys' fees and costs. Hall Street responds that the arbitrator correctly named it the prevailing party under Oregon's statutes and cases, and that the arbitrator's reductions to the award of attorneys' fees were appropriate.

Where a lease does not define the term "prevailing party," the court applies the statutory meaning, which is defined in ORS 20.096(5) as "the party in whose favor final judgment or decree is rendered." Anderson, 324 Or. at 579 (citing Carlson v. Blumenstein, 293 Or. 494, 499-500, 651 P.2d 710 (1982) (footnote omitted)).[8] The Oregon Supreme Court has stated that where parties use the definite article "the" in reference to the prevailing party, "the agreement establishes that every 'suit or action * * * instituted' will result in having one, but only one, prevailing party, who 'shall be entitled to recover' attorney fees 'in addition to costs.'" Anderson, 324 Or. at 578-79. The Oregon Court of Appeals recently capsulized

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[8] The definition of prevailing party found at ORS 20.096(5) was deleted by an amendment which became effective January 1, 2002. However, the definition is still applicable in this case as provided by Section 9, chapter 542:

> [T]he amendments to ORS . . . 20.096 . . . apply only to actions commenced on or after the effective date of this 2001 Act. Any action commenced before the effective date of this 2001 Act shall continue to be governed by the provisions of law in effect immediately before the effective date of this 2001 Act, as though this 2001 Act had never become law.

Anderson as "concluding that, as to claims brought under the contract, there could be only one prevailing party." CMS Sheep Co., Inc. v. Russell, 179 Or. App. 172, 178, 39 P.3d 262 (2002) (no emphasis added). In determining the prevailing party, "[t]he fact that plaintiffs lost more claims than they won is irrelevant to the fact that they 'prevailed' in the legal sense." Anderson, 324 Or. at 581 (Durham, J., concurring). For the defendant to be the prevailing party under ORS 20.096(5), the plaintiff must not succeed on any of its claims. See Wilkes v. Zurlinden, 328 Or. 626, 632, 984 P.2d 261 (1999). If both parties file claims under the contract and are successful, the damages are "netted" to determine the party in whose favor judgment was rendered. *See Carlson*, 293 Or. at 501. If both parties file claims and are unsuccessful, more than one prevailing party may exist under ORS 20.096(5). See Wilkes, 328 Or. at 633. In suits involving both statutory and contract claims, the prevailing party is the party that prevailed on the claims that are subject to the contractual fee provision, not the party that prevails on the action as a whole. See Newell v. Weston, 156 Or. App. 371, 379, 965 P.2d 1039 (1998).

Here, Section 24 of the lease provides that "the losing party shall pay the prevailing party a reasonable sum for attorneys' fees, costs and expenses." The lease does not define the term "prevailing party," so the court applies the statutory definition to determine in whose favor final judgment was rendered. Hall Street sought damages for breach of contract as well as declaratory and injunctive relief under the contract, and was awarded judgment in the sum of $484,031.12 and a declaratory judgment. Mattel filed no counterclaims. As the arbitrator found, there could be only one prevailing party in this case, and Hall Street is the prevailing party because it prevailed on some of its claims brought under the contract.

Regarding the award of attorneys' fees and costs under Section 24, the arbitrator concluded that Hall Street had

properly excluded its attorneys' fees and costs spent litigating the unsuccessful claims, and that the time expended and the hourly rates of the firms employed by Hall Street were reasonable. The arbitrator reduced the award of attorneys' fees for Schwabe, Williamson & Wyatt and Sho[illegible] Cressman by twenty percent and the award of attorneys' fees for Tonkon Torp by twenty-five percent. The arbitrator made the reductions because the fees contained time spent on the repair issue, which should have been excluded, and because Hall Street received nominal damages for the lost water supply and de minimis damages for TCE contamination to shallow soils and groundwater.

I find no basis for upsetting the arbitrator's award of attorneys' fees and costs, and find the accompanying reductions to be reasonable and supported by substantial evidence.

CONCLUSION

Plaintiff's motion (# 90) to modify the arbitration award is DENIED. Defendant's motion (# 92) for review and modification of the arbitration decision is GRANTED in part and DENIED in part. Hall Street is the prevailing party and is awarded judgment in the amount of $484,031.12, plus attorneys' fees of $252,065.32 and costs of $74,011.05. Interest will accrue on the judgment at the rate of nine percent from the date of the arbitration award until this court enters judgment. No interest will accrue on the award of attorneys' fees and costs prior to the entry of judgment. Interest will accrue on the judgment and the award of attorneys' fees and costs at the rate of six percent from the entry of judgment.

IT IS SO ORDERED.

DATED this 1st day of May, 2003.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

JUDGMENT

This matter was bifurcated by the Court's Order dated December 11, 2000.

In the first phase, the Court conducted a bench trial beginning on April 27, 2001 regarding the validity of defendant Mattel, Inc.'s notice of lease termination. The Court rendered its Order in its Findings of Fact and Conclusions of Law on May 21, 2001, ordering that judgment be entered for Mattel on the lease termination issues.

In the second phase, by Stipulation of the parties and Order of the Court dated October 23, 2001 ("Arbitration Order"), Hall Street's remaining claims for indemnification and damages arising out of the lease agreement were sent to arbitration. By stipulation of the parties, the arbitration was held commencing December 12, 2001 before Arbitrator Larry T. Coady. The Arbitrator initially ruled generally in favor of

Mattel. However, the Court granted Hall Street's Motion for an Order Vacating, Modifying and/or Correcting the Arbitration Findings of Fact and Conclusions of Law and, by Opinion and Order dated April 29, 2002, reversed and remanded the case to the Arbitrator for further consideration.

On remand, after further briefing and argument by the parties, the Arbitrator designated Hall Street the prevailing party, awarded Hall Street judgment plus costs and attorneys' fees, and entered a declaratory judgment in Hall Street's favor. Both parties challenged certain aspects of the Arbitrator's Findings of Fact and Conclusions of Law on Remand. By Opinion and Order dated May 1, 2003, the Court generally upheld the Arbitrator's Award on Remand, making only slight modifications to the award of pre- and post-judgment interest. The Court upheld the Arbitrator's conclusions that the lease imposed broad liability on Mattel for any environmental damage to the property and required Mattel to indemnify Hall Street for such costs, including the costs of third-party lawsuits related to TCE contamination. Therefore, in accordance with the Court's May 1, 2003 Opinion and Order,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That plaintiff Hall Street Associates, L.L.C. is declared the prevailing party in this action;

2. That judgment be awarded to plaintiff Hall Street Associates, L.L.C. for damages incurred in the amount of $484,031.12;

3. That judgment be awarded to plaintiff Hall Street Associates, L.L.C. for attorneys' fees incurred of $252,065.32 and costs incurred of $74,011.05;

4. That interest will accrue on the judgment for damages ($484,031.12) at the rate of nine percent (9%) from the date of the arbitration award (November 19, 2002) until this Court enters judgment;

5. That interest will accrue on both the judgment for damages and the judgment for attorneys' fees and costs (total of $810,107.49) at the rate of six percent (6%) from the entry of judgment until paid;

6. That declaratory judgment be awarded in favor of plaintiff Hall Street Associates, L.L.C. and against defendant Mattel, Inc. for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental clean up of the property; and

7. That plaintiff Hall Street Associates, L.L.C. shall submit a supplemental attorney fee petition for fees and costs incurred since the submission to the Arbitrator of its original fee petition within fourteen (14) days after entry of this Judgment, pursuant to FRCP 54(d)(2)(B).

Dated this 14th day of May, 2003.

/s/ Robert E. Jones
THE HONORABLE ROBERT E. JONES
Senior United States District Judge

Respectfully submitted:

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Michael A. Cohen
JAMES M. FINN, OSB #79223
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Hall Street Associated, L.L.C.

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed NOV 16, 2004]

No. 03-35525
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff- Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

No. 03-35526
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellant,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellee,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted November 3, 2004
Portland, Oregon

MEMORDNDUM*

Before: TROTT and KLEINFELD, Circuit Judges, and POLLAK,** District Judge.

Our en banc decision in Kyocera Corp. v. Prudential-Bache Trade Services., Inc.[1] controls this case. Under *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.[2] The evidence that the parties intended that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed is not strong enough to distinguish this case from Kyocera.

Kyocera compels us to vacate the district court's judgment based on the arbitration agreement and remand to the district court.[3] On remand the district court shall return to the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

[2] *Kyocera*, 341 F.3d at 1000-02.

[3] *Id.* at 994 ("The Federal Arbitration. Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsub-

application to confirm the original arbitration award (not the subsequent award revised after reversal), and shall confirm that award, unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.[4]

Because we vacate the judgment based on the arbitration agreement we need not reach the attorneys' fees issue.

We affirm the district court's separate finding that Mattel was within its rights in terminating the lease. Although the lease termination provision suggests a possible scrivener's error when the lease was amended, no mistake is claimed nor reformation sought, and the parol evidence rule requires that this integrated agreement be enforced as written without consideration of extrinsic evidence.[5]

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

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stantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard. Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts.").

[4] Id. at 997-98.

[5] See Indus. Indem. Co. v. Aetna Cas. & Sur. Co., 465 F.2d 934, 937 (9th Cir. 1972).

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed JUN 30, 2005]

Civil No. 00-335-JO

HALL STREET ASSOCIATED, L.L.C.,
A Washigton limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation, et al.,
Defendant.

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JONES, Judge:

This action is before the court on remand from the Ninth Circuit Court of Appeals. Specifically, the appellate court instructs this court to confirm the original arbitration award unless grounds exist under the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11, to vacate, modify, or correct the award. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

In February 2005, I invited the parties to submit their objections, if any, to confirmation of the original award. Plaintiff submitted objections and defendant responded. Having considered the parties' arguments and for the reasons stated below, I once again vacate the original arbitration award.

PROCEDURAL HISTORY

Plaintiff Hall Street Associates brought this action against defendants Mattell, Inc., and its predecessor (together, "defendant") for indemnification arising out of a lease agreement. The issues were submitted to an arbitrator in December 2001, who found generally in favor of defendant and awarded fees and costs. On April 29, 2002, I granted plaintiff's motion to vacate the arbitrator's findings and conclusions and remanded the action to the arbitrator for further consideration. On remand, the arbitrator found in favor of plaintiff, awarded costs and fees, and entered a declaratory judgment in plaintiffs favor. Both plaintiff and defendant moved for review and modification of the second arbitration award. On May 1, 2003 I granted plaintiff's motion, granted in part and denied in part defendant's motion, and awarded plaintiff judgment in the sum of $484,031.12, plus attorneys' fees of $252,065.32 and costs of $74,011.05.

Meanwhile, in 2003, the Ninth Circuit decided *Kyocera*, which limited the scope of judicial review of arbitral awards to those grounds allowed under the Federal Arbitration Act

("FAA"). Based on that new interpretation, on January 18, 2005, the Ninth Circuit vacated my April 29, 2002, decision, which vacated and remanded the original arbitration award.

FACTUAL BACKGROUND

This case originally involved several disputes between a landlord and tenant over the tenant's obligations under a lease agreement. Plaintiff owns the property at issue, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon ("Property"). Defendant leased the premises from plaintiff until May 31, 2001. As relevant to these continuing proceedings, plaintiff contends that defendant is liable for cleanup of environmental contamination at the Property, and defendant contends it qualifies for an exception to liability under the contract.

History

The relevant history surrounding the Property dates back more than 50 years, when Sawyers, Inc., owned the Property and began a toy manufacturing facility on the site.[1] GAF corporation acquired Sawyers in 1967, and continued the toy manufacturing operations. GAF eventually sold the Property to View-Master in 1981, which operated a similar toy facility on the site. In 1983, View-Master sold the Property to Western International Properties, but then leased it back from Western to continue its operations. In 1984, Western sub-divided the Property and sold the relevant parcel to John Eyler. Eyler then conveyed the Property to Cascade Square Associates in 1985. In 1989, while View-Master was still leasing the Property, View-Master was acquired by Tyco.[2] Defendant acquired Tyco in 1997. Finally, in 1998 Cascade transferred its ownership interest in the Property to plaintiff.

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[1] At that time, the Property was separated into three parcels: parcels 1, 2, and 3. The parcel relevant to this action is parcel 1.

[2] Tyco refers collectively to Tyco Industries, Inc., Tyco Manufacturing Corporation and Tyco Toys, Inc.

The Lease Agreement

On March 5, 1991, View-Master entered into a Lease Agreement ("Lease") with Cascade Square Associates, pursuant to which Cascade Square Associates agreed to lease the premises to View-Master. The Lease provided that View-Master would lease the property for commercial purposes for a term of approximately six years. Because View-Master and its predecessors had used the Property and operated facilities there for many years, View-Master was more familiar with its condition. Consequently, the Lease provided that with certain limited exceptions, View-Master would indemnify Cascade for any activities undertaken by it or its predecessors on the Property.

On April 29, 1996, Cascade Square Associates and View-Master executed an amended lease ("Amended Lease"), which was substantially similar to the 1991 lease. After acquiring Tyco, defendant became the tenant under the Amended Lease. Defendant terminated the Amended Lease on May 31, 2001.

Environmental Issues on the Property

In 1950, a well and water tower were installed on the Property to supply water to the facility. Thereafter, between 1951 and 1980, Sawyers and GAF used trichloroethene ("TCE") in the toy manufacturing operations. While most of the work with TCE was done on the surrounding areas and not on the Property, Sawyers/GAF did dispose of sanitary wastes through a septic tank and drainfield located at the north end of the Property. There is no evidence that any party used TCE in any operations on the Property after 1981. It is undisputed that neither defendant nor any of its predecessors, however, ever tested the well water, groundwater or shallow soils for contaminants on the Property.

In March 1998, plaintiff commissioned SECOR, an environmental consultant, to test the Property's well water for

pollutants. SECOR discovered that the water contained TCE levels that far exceeded the federal maximum allowable level. Upon this discovery, the Oregon Department of Environmental Quality ("DEQ") began investigating the contamination and planning remedial measures. The DEQ investigation revealed additional contaminants, including petroleum hydrocarbons, cyanide, chromium and silver. Contamination was found on the Property as well as adjacent parcels, in the well water, the shallow soil, the groundwater and the deep aquifer underlying the Property. Upon discovery of the extensive contamination at the site, defendant shut down the well.

In November 1998, defendant and GAF entered into a consent order with DEQ, pursuant to which GAF agreed to investigate the environmental conditions of the Property and defendant agreed to provided public outreach and communication to its employees. As part of the site investigation, the DEQ performed a risk assessment to evaluate the levels of contaminants and the dangers they posed. The risk assessment identified current and future risks at the site: (1) unacceptable risk from TCE in the deep aquifer underlying the Property, if that source is used for drinking water; and (2) unacceptable risk from TCE in the drainfield area, primarily faced by trench workers performing excavation in that area who may be exposed to shallow groundwater. In addition, petroleum hydrocarbons were identified in the soil located under certain buildings on the Property. The DEQ found that the hydrocarbons posed no threat so long as the buildings remain, but noted that if the buildings were ever removed, the hydrocarbons in the soil would require treatment.

Plaintiff filed this action on March 10, 2000, raising three issues: (1) whether defendant legitimately terminated the Amended Lease on May 31, 2001; (2) whether defendant was obligated to indemnify plaintiff for costs related to environmental cleanup; and (3) whether defendant was obligated to indemnify plaintiff for expenses incurred in defending

itself against third party lawsuits. The first issue was resolved following a bench trial on April 27, 2001. The remaining issues were resolved in an arbitration held in December 2001. The arbitrator found in favor of defendant, concluding that it was not obligated to indemnify plaintiff for either environmental cleanup or third party lawsuits.

In reference to environmental cleanup, the arbitrator determined that defendant, Tyco, and View-Master had been in compliance with "applicable environmental laws" and were therefore excepted from liability under the Amended Lease.[3] The arbitrator then ordered plaintiff to pay defendant costs and fees incurred litigating the action.

This Court's 2002 and 2003 Decisions

On February 2, 2002, plaintiff filed a motion to vacate, modify, and/or correct the arbitrator's findings and award. In keeping with the scope of review set forth in the parties' arbitration agreement, I reviewed the arbitrator's findings of fact for substantial evidence and his conclusions of law for error.[4] Under those standards, I found that the arbitrator erred as a matter of law in concluding that the Oregon Drinking Water Quality Act ("ODWQA"), was not an "applicable environmental law" within the meaning of Sections 12c and

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[3] Sections 12(c) of the Lease provides:

> To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b above, Tenant shall not be held liable following the expiration of this Lease term for the following * * * (iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc.

[4] Paragraph 27 of the Arbitration Agreement provides:

> The Court shall vacate, modify or correct any award: (I) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

13a of the Amended Lease. On April 29, 2002, I remanded the case to the arbitrator for reconsideration consistent with my ruling.

On remand, the arbitrator found defendant in violation of the ODWQA as an applicable environmental law, and designated plaintiff the prevailing party. I affirmed that decision on May 14, 2003. Both parties appealed to the Ninth Circuit Court of Appeals and, as noted, the case is before me on remand.

DISCUSSION

1. Standard of Review

In Kyocera, the Ninth Circuit held that federal court review of arbitral decisions is limited to the grounds set forth in the Federal Arbitration Act, 9 U.S.C. § 10, and that private parties have no power to alter or expand those grounds by stipulation or agreement. Kyocera, 341 F. 3d at 1000. That ruling formed the basis of the remand in this case. The Ninth Circuit specifically instructed this court to review the original arbitration award under the allowable grounds for vacatur in the FAA. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 2004 WL 2596020 (9th Cir. 2004).

The parties nonetheless disagree on the standard of review that governs my analysis on remand. Plaintiff contends that the original arbitration award should be vacated because the arbitrator's interpretation of the phrase "applicable environmental law" as excluding the ODWQA is an "implausible interpretation" of the contract. Defendant, in turn, argues that the arbitrator's interpretation is neither "completely irrational" nor in "manifest disregard for the law" and therefore not subject to judicial intervention under the FAA. Therefore, I must first determine what grounds for vacatur are "allowable" under the FAA.

Section 10 of the FAA allows vacatur if (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made. 9 U.S.C. § 10. Arbitrators "exceed their powers" when the award is "completely irrational," or exhibits a "manifest disregard of the law." Kyocera, 341 F. 3d at 997-98. In a recent post-Kyocera decision, the Ninth Circuit also confirmed that an arbitrator's "implausible interpretation of [a] contract" can be vacated under the FAA. Theis Research, Inc. v. Brown & Bain, 386 F. 3d 1180, 1185 (9th Cir. 2004) (citing Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh, 933 F.2d 1481 (9th Cir. 1991)), amended on denial of rehearing, 400 F.3d 659 (9th Cir. 2005).

Thus, although Kyocera does not mention the "implausible interpretation" standard, Theis clarifies the Ninth Circuit's position concerning the scope of review of an arbitrator's contract interpretation under the FAA. Several other circuits also apply the "implausible interpretation" standard in FAA cases. See, e.g., Bull HN Information Systems, Inc. v. Hutson, 229 F. 3d 321 (1st. Cir. 2000); Jacada, Ltd. v. International Marketing Strategies, Inc., 401 F. 3d 701 (6th Cir. 2005); George Watts & Sons, Inc. v. Tiffany and Co., 248 F. 3d 577 (7th Cir. 2001); Manion v. Nagin, 392 F. 3d 294 (8th Cir. 2004); Brown v. Coleman Co., Inc., 220 F.3d 1180 (10th Cir. 2000). Because the present dispute requires interpretation of a contract, I apply the "implausible interpretation" standard here.

2. Was the Arbitrator's Interpretation "Plausible"?

The arbitrator's interpretation of the contract must be sustained if it is plausible. Employers Ins., supra, 933 F.2d at 1486 (citing Sheet Metal Workers Intl Ass'n v. Arizona Mechanical & Stainless, Inc., 863 F. 2d 647, 653 (9th Cir.

1988)). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Intern. Union. AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987); Employers Ins., 933 F.2d at 1486. Because "the parties [have] authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." Employers Ins., 933 F.3d at 1486 (citing United Paperworkers, 484 U.S. at 38).

My task is, therefore, to determine whether the arbitrator's interpretation of the phrase "applicable environmental laws" as excluding the ODWQA was "plausible." Employers Ins., 933 F.2d at 1487. I conclude that it was not.

Neither party seriously disputes that the ODWQA is an "environmental law." Mattel, for example, refers to the ODWQA as an "unrelated environmental law." Mattel's Memorandum of Points and Authorities in Support of Motion for Review and Modification of Arbitration Decisions, 12/16/02, p. 16.

The ODWQA is Oregon's version of the Federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26. See ORS 448.277 (authorizing the Department of Human Services ("DHS") to enter into an agreement with the federal government to administer the SDWA in Oregon). The SDWA is an environmental law. See, e.g., In re Willy, 831 F.2d 545, 546 (5th Cir. 1987) (including the SDWA in a list of "environmental statutes").

The text of the ODWQA directs the DHS to act in accordance with the "goal of the people of the State of Oregon to prevent contamination of Oregon's ground water resource while striving to conserve and restore this resource and to maintain the high quality of Oregon's ground water

resource for present and future uses." ORS 448.123(2), 448B.155. The ODWQA is therefore focused not only on treating water to protect public health but also on protecting ground water as an environmental resource. The ODWQA clearly is an environmental law.

However, the arbitrator reasoned that the ODWQA was not "applicable" within the meaning of the parties' lease because it applies to owners and operators of public water systems and is intended to protect, improve and provide safe drinking water to the public. From this premise the arbitrator determined that the ODWQA is not applicable to the indemnification exception for pollution liability under the lease.

Nothing in the lease supports the arbitrator's finding that the phrase "applicable environmental laws" means anything other than its plain meaning; i.e., the body of environmental law that generally applies to Mattel and with which Mattel's non-compliance could expose Mattel or Hall Street to civil or criminal penalties. As Hall Street explained in its recently filed objections to the original arbitration award:

> It is undisputed that Mattel failed to test the water on the Property for the presence of contaminants at any time during its twenty-year period of occupancy. The Arbitrator so found, (½/02 Findings of Fact ("FF"), ¶ 24) ("During the period 1981-1998, View-Master, Tyco, and Mattel did not test the well water, groundwater, or shallow soils for contaminants."), and Mattel's counsel expressly acknowledged the fact in his closing argument at the arbitration. * * * ("[I]s Mattel proud of the fact that they didn't test the water? . . . Absolutely not."). Indeed, the TCE contamination was only discovered after Hall Street commissioned SECOR to test the wall water in 1998. (½/02 FF, ¶ 25.) When the well was finally tested, it "showed TCE concentrations ranging from 1220 to 1520 micrograms per liter (ug/L). The Federal Drinking Water Standard for TCE is 5 ug/L."

> * * * Mattel has never contested the fact, nor could they, that their failure to test the water at the site constituted a violation of the Oregon Drinking Water Quality Act.

Hall Street's Objections to Confirmation of Original Arbitration Award on Remand, 3/25/05, p. 4 (certain citations omitted). A twenty-year violation of the ODWQA carries a potential exposure of $3,650,000 of civil penalties under ORS 448.280 which provides, as relevant, a penalty of up to $500 for each day of violation.

I find Hall Street's contention valid that the parties contemplated compliance with *all* environmental laws affecting this property at the formation of the lease, including those meant to protect public health, and that Mattel should have understood that it not only had to refrain from further contaminating the property, it also had to ensure that the public was protected from any pre-existing contamination in order to trigger the indemnification exception to pollution liability.

The arbitrator cited no particular provision in the lease to support the plausibility of his reasoning. Indeed, no law would qualify as an "applicable environmental law" under the arbitrator's reasoning because no environmental statute is designed to protect property owners from property damage; the purpose of such statutes is to protect the environment and human health. Nothing in the lease supports the arbitrator's finding that the parties did not consider the ODWQA to be an "applicable environmental law" at the time of formation. Therefore, the January 2, 2002, original arbitration award is VACATED.

This brings me to the question of how to proceed. On remand of the original arbitration decision in April 2002, I directed the arbitrator to consider the ODWQA to be an applicable environmental law. The arbitrator did so, and issued an amended arbitration decision generally favoring

Hall Street, followed by a Final Arbitration Award. Both parties challenged the second award, and in May 2003, I issued an opinion adopting in part and reversing in part the arbitrator's decision and entered judgment accordingly.

Now, as then, my resolution of the currently pending issue requires no further action by the arbitrator. Therefore, I enter judgment in accordance with my Opinion and Order filed on May 1, 2003.

IT IS SO ORDERED.

DATED this 29th day of June, 2005.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed JUN 5, 2005]

Civil No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited-liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

JUDGMENT

In accordance with the Opinion and Order dated May 1, 2003, the Opinion and Order dated July 14, 2003, the Judgment entered on May 15, 2003, and the Opinion and Order filed this date,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That plaintiff Hall Street Associates, L.L.C., is declared the prevailing party in this action;

2. That judgment be awarded to plaintiff Hall Street Associates, L.L.C. for damages incurred in the amount of $484,031.12;

3. That judgment be awarded to plaintiff Hall Street Associates, L.L.C., for attorneys' fees incurred of $252,065.32 and costs incurred of $74,011.05, and for supplemental attorneys' fees of $47,930.75 and supplemental costs and expenses of $2,610.12;

4. That interest will accrue on the judgment for damages ($484,031.12) at the rate of nine percent (9%) from the date of the arbitration award (November 19, 2002) until this Court enters judgment;

5. That interest will accrue on both the judgment for damages and the judgment for attorneys' fees and costs at the rate of six percent (6%) from the entry of judgment until paid;

6. That declaratory judgment be awarded in favor of plaintiff Hall Street Associates, L.L.C. and against defendant Mattel, Inc. for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental clean up of the property; and

7. That, if appropriate, plaintiff Hall Street Associates, L.L.C. shall submit a supplemental attorney fee petition for fees and costs incurred since entry of judgment on May 13, 2003, within fourteen (14) days after entry of this judgment, pursuant to FRCP 54(d)(2)(B).

DATED this 29th day of June, 2003.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX K

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed AUG 1, 2006]

No. 05-35721
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,

Defendants.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted July 25, 2006
Portland, Oregon

MEMORANDUM*

Before: GOODWIN, REINHARDT, and GRABER, Circuit Judges.

This appeal of the district court's refusal to enforce an arbitration award is before us for the second time. *See Hall St. Assoc., LLC v. Mattel, Inc.*, 113 Fed. Appx. 272 (9th Cir. 2004). Initially, we reversed the district court for using an improper standard of review and provided instructions to enforce the arbitration award unless grounds for not doing so existed under either 9 U.S.C. §§ 10 or 11. *Id.* at 272. On remand, the district court again failed to enforce the arbitration award, this time because it was "implausible." Implausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. §§ 10 or 11.

Although the arbitrator's assessment of the merits in this case contains possible errors of law, those errors are not a sufficient basis for a federal court to overrule an arbitration award. *See Employers Ins. of Wausau v. Nat'l Union Fire Ins.*

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Co. of Pittsburgh, 933 F.2d 1481, 1486 (9th Cir. 1991) ("We may not predicate reversal on . . . erroneous findings of fact or conclusions of law."); *see also Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001) ("Our task is, in essence, to review the procedural soundness of the arbitral decision, not its substantive merit."). Furthermore, it cannot be said that the arbitrator's decision in this case is "completely irrational." *See Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (construing 9 U.S.C. § 10(a)(4), the only subsection of either 9 U.S.C. §§ 10 or 11 that could conceivably apply to the arbitration award in this case). Thus, we remand the case to the district court with instructions to enforce the original arbitration award and declare Mattel the prevailing party. The district court's award of attorneys' fees in favor of Hall Street Associates, L.L.C. v. Mattel, Inc., Nos. 05-35721, 05-35906

GRABER, Circuit Judge, dissenting:

I respectfully dissent because, although the majority correctly identifies the governing legal principles, I conclude that the arbitrator's decision was completely irrational.

Paragraph 12(a) of the Lease provides, as relevant here, that "Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises." Paragraph 12(c) of the Lease provides that the tenant shall not be held liable for certain items "[t]o the extent Tenant has been in compliance with applicable environmental laws." In context, the only rational reading of the phrase "applicable environmental laws" in Paragraph 12(c) is as shorthand for "all federal, state and local environmental laws and regulations in [Tenant's] use of the Premises," the longhand description just given in Paragraph 12(a). That is, any environmental law with which the tenant was required to comply in its use of the premises was "applicable" within the meaning of Paragraph 12 as a whole. Paragraph 12(b)

confirms the necessity of interpreting "applicable" in this way because it provides that the tenant "assumes all responsibility for the investigation and cleanup" of any hazardous waste on the premises and that the tenant is liable for, and must indemnify the landlord for, all costs resulting directly or indirectly from the "presence" of any hazardous waste on the premises.

This understanding of Paragraph 12 arises not only from the words and structure of the Lease, but also from the arbitrator's own findings as to the parties' intent. The arbitrator found that Mattel agreed to a comprehensive indemnification of Hall Street, irrespective of the time of the occurrence that resulted in the presence of hazardous wastes on the premises.

It is undisputed that the statute in question here is an "environmental law." The arbitrator's conclusion that the statute was not "applicable" is completely irrational in view of (a) the clear meaning of Paragraph 12 and (b) the undisputed facts that Mattel failed to test the water supply for eighteen years even though the statute required it to have done so, resulting in Mattel's signing of a consent order with the state's Department of Environmental Quality.

Accordingly, I would either affirm the decision of the district court (albeit on different grounds) or remand the case for reconsideration under the appropriate legal standard.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-35721
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC,
a Delaware corporation; et al.,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC,
a Delaware corporation; et al.,
Defendants.

Appeal from the United States District Court
for the District of Oregon (Portland).

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED and REMANDED**.

Filed and entered Tuesday, August 1, 2006

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed OCT. 17, 2006]

No. 05-35721

D.C. No. CV-00-00355-REJ
District of Oregon,
Portland

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,

Defendants.

ORDER

Before: GOODWIN, REINHARDT, and GRABER, Circuit Judges.

Judges Reinhardt and Graber have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

(2)

No. 06-989

Supreme Court, U.S.
FILED
APR 24 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

vs.

MATTEL, INC., *et al.*,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Landlord Hall Street found contamination on its property from chemicals spilled many years before by a prior owner. Rather than sue that owner, the landlord sued its tenant Mattel, which never used the chemicals, for the property damage and indemnity. Later, Hall Street sold its property for $5.4 million without informing the court. It then distributed all of its assets to avoid paying the judgment now pending against it. The questions presented are:

1. Should the Court grant certiorari when the result would have been the same under the expanded standard of judicial review requested by the landlord?

2. Can this Court review the arbitrator's finding of fact regarding the intent of the parties to the lease when Hall Street did not appeal the findings of fact nor lodge the evidence from the arbitration with the district court?

3. Should the Court grant discretionary review to an empty shell corporation that has not complied with the orders and judgment of the lower courts?

STATEMENT PURSUANT TO RULE 29.6

Mattel, Inc. ("Mattel") is a Delaware corporation with no parent corporation. No publicly held company owns 10% or more of Mattel's stock.

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OPINIONS BELOW

Hall Street's statement of the opinions below contain the following omissions: The district court entered judgment against Hall Street on May 21, 2001, regarding its claims that the tenant improperly terminated its lease. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 145 F. Supp. 2d 1211 (D. Or. 2001). Hall Street appealed and the Ninth Circuit affirmed the district court on this issue. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 03-35525, No. 03-35526, 2004 U.S. App. LEXIS 23993 (9th Cir. Nov. 16, 2004) (unreported). Hall Street sought *en banc* review, which was denied by an order dated January 4, 2005 (unreported).

The district court entered judgment against Hall Street for $1.23 million on February 26, 2007. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 00-355-JO, 2007 U.S. Dist. LEXIS 14128 (D. Or. Feb. 26, 2007) (unreported).

COUNTERSTATEMENT OF THE CASE

Hall Street's Property: The landlord's Property was formerly owned by GAF Corporation and Sawyers, Inc. (ERA 94; ERA 68, FF ¶¶ 3-10.)[1] They contaminated the Property with chemicals including trichloroethylene

[1] Excerpts of Record in the 2005 appeal are abbreviated as "ERA" to distinguish them from Excerpts of Record in the 2003 appeal, which are abbreviated as "ER." Findings of Fact and Conclusions of Law by the arbitrator in this case are abbreviated as "FF" and "CL" respectively. The abbreviations "1Op," "2Op," and "3Op" are to the district court's May 21, 2001, findings and conclusions (Docket No. 50), April 29, 2002, opinion (Docket No. 82), and May 1, 2003 opinion (Docket No. 104) respectively. The abbreviations "1FF," "2FF," "1CL," and "2CL" are used to indicate when ER cites are to the findings of fact and conclusions of law from the first (Docket No. 66) and second (Docket No. 84) arbitration proceedings.

("TCE"). (ERA 96; ERA 74, FF ¶ 22.) No subsequent occupant used TCE. (ERA 96; ERA 74, FF ¶ 22.)

In 1981, GAF sold the property to View-Master International Group (a partnership). (ERA 94; ERA 68, FF ¶ 7.) In 1983, View-Master sold the Property and the other parcels it owned to Western International Properties; it continued to lease the Property. (ERA 94; ERA 68, FF ¶ 9.)

Western International sold the Property to John Eyler in 1985. (ERA 94; ERA 68, FF ¶ 10.) Mr. Eyler formed a partnership, Cascade Square Associates, and conveyed the Property to it. (ERA 94; ERA 68, FF ¶ 10; ERA 51.) In 1998, Cascade discovered the contamination. It formed Hall Street Associates and conveyed the Property to it for the purpose of shielding Cascade's principals from liability. (ERA 50-51, 294-95.)

The Lease: Cascade had entered into a series of leases with successive tenants, including View-Master International Group, Inc., a corporation, in 1985 (ERA 94-95; ERA 68-69) and View-Master Ideal Group, Inc. in 1991 (ERA 95; ERA 69, FF ¶ 16; ERA 178-210).

In 1997, View-Master Ideal Group merged with Tyco Toys. Mattel merged with Tyco in 1997 and assumed the lease. (ERA 95; ERA 68, FF ¶ 12; ERA 233-34.)

The lease at Sections 12(c) and 13(a) expressed the parties' agreement that the tenant would not be responsible for environmental problems it did not cause. Those provisions provided that "[t]o the extent Tenant has been in compliance with applicable environmental laws, Tenant shall not be held liable following the expiration of this Lease term for . . . the removal and disposal of any hazardous waste on the Premises . . . or other liability . . .

which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc." (ER 119-21, 2FF ¶¶ 22(f, h); ER 206-10.)

Under Section 13 of the lease, the tenant is responsible only for its own activities by allocating any defense costs sought by the landlord "based on Tenant's actual contribution to the damages." (ER 120, 2FF ¶ 22(h); ER 180, 3Op 19; ER 209.)

Under Section 20, the tenant is responsible only to return the Property in the condition it was leased, not in an improved condition. (ER 121, 2FF ¶ 22(i); ER 217-18.) All of the TCE contamination existed before the lease.

GAF Agrees to Cleanup: When the contamination was discovered in 1998, GAF and Mattel entered into a consent order with the Oregon Department of Environmental Quality ("DEQ"). (ERA 96; ERA 75, FF ¶ 29.) GAF agreed to take over the lead role for responding to the contamination. (ERA 96; ERA 75, FF ¶ 29.) In October 2001, DEQ issued its remediation plan and GAF undertook the investigation and cleanup activities. (ERA 97; ERA 75-76.) Hall Street has reserved its claims against GAF for causing the contamination. (*See* Arbitration trial testimony of Robert Hibbs, December 12, 2001 (Docket #135), pp. 184-88.)

The Water System: Hall Street owned the water system on the Property and leased it to its tenants. (ERA 95; ERA 69, FF ¶ 16; ERA 178-79.) The landlord provided a covenant of quiet enjoyment that the Property was suitable for its intended use. (ERA 203.)

The Oregon Drinking Water Quality Act obligates the owner and operator of a public water system to test the water

for contaminants. Or. Rev. Stat. §§ 448.115(12), 448.131; Or. Admin. R. §§ 333-061-0020(150), 333-061-0036. The parties were unaware of the application of the term "public water system" to the well; neither tested the water for TCE until 1998. (ERA 74, FF ¶ 25.)

Procedural History: In May 2001, Mattel terminated the Lease. (ERA 95; ERA 69, FF ¶ 14.) Hall Street sued Mattel to prevent termination and added claims for property damage and indemnity related to the contamination. The district court bifurcated the issues. (ERA 32.) After trial, the court granted judgment to Mattel on the lease termination issue. (ERA 42-48.) The district court ordered the parties to mediate all remaining issues. (ERA 53.) When mediation was unsuccessful, the parties agreed to arbitration. (ERA 54-64.)

Arbitration Decision for Mattel: The arbitrator conducted a full evidentiary hearing. He heard witnesses, reviewed documentary evidence and briefing, conducted a site tour, and prepared an extensive set of findings of fact and conclusions of law. (ERA 65-84.) The arbitrator rejected all of Hall Street's claims on January 2, 2002. (ERA 65-84.) He held that the tenant did not use TCE and "*as far as the Lease was concerned*" did not violate any environmental law "applicable" to the release of TCE and the resulting damage:

> Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with respect to TCE and, therefore, the exception to liability under Sections 12 and 13 have been met. They did not use TCE and their actions have not been shown to have resulted in additional TCE contamination. Their failure to test for, or otherwise discover, the TCE

> contamination does not constitute a violation of "applicable environmental laws" regarding TCE.
>
> (ER 082, 1CL §5.)

Hall Street also presented no evidence of diminution of value or the condition of the property at the time of its purchase. (ER 082, 1FF §41.)

The arbitration agreement required that any request for review of the arbitrator's decision had to be made within 15 days of that decision. (ERA 57.) After the 15-day period expired, Mattel requested that the district court enter judgment. (ERA 101.) The district court denied Mattel's request and allowed Hall Street to file an untimely request for judicial review of the arbitrator's decision. (ERA 101; ERA 104.)[2]

Hall Street did not lodge the arbitration record with the district court and did not seek review of the arbitrator's findings of fact. Rather, it has asked the court to reverse the arbitral decision as a pure matter of law. (ERA 100.)

The District Court's Remand to the Arbitrator: After briefing by the parties, the district court vacated the arbitrator's decision on April 29, 2002. (ERA 96; ERA 107;

---

[2] The Arbitration Agreement provided that "[t]he arbitrator shall decide the arbitration on or before December 30, 2001, and issue written findings of fact and conclusions of law. Any request for review of the arbitrator's decision will be made by motion to Judge Jones and filed within 15 days of the arbitrator's ruling." (ER 057.) The district court had earlier confirmed these conditions by its order dated October 23, 2001. (ER 054-64.) Hall Street did not request review of the arbitration decision by the deadline, then waited until Mattel's request to the district court to enter judgment against it before seeking relief from its default. (ER 101, 2Op 10.)

ERA 109.) It remanded the case to the arbitrator to make additional findings consistent with its decision. (ERA 110-11.)

On September 3, 2002, the arbitrator made supplemental findings of fact as directed by the district court and consequently made an award on the indemnity issue to Hall Street in addition to attorney fees and costs. (ERA 114-37.) Both parties sought judicial review of the arbitrator's supplemental findings. Mattel lodged the arbitral record to support its request. Hall Street sought a larger damage award.

On May 1, 2003, the district court vacated in part the arbitrator's supplemental findings of fact and conclusions of law. The court made certain new findings of fact and conclusions of law then entered judgment for Hall Street on the indemnity claim. The district court also affirmed the award of attorneys' fees and costs to Hall Street as the sole prevailing party.

Appeal to the Ninth Circuit: Hall Street appealed the district court's judgment on the lease termination issue, and Mattel appealed on the indemnity issue. That Court rejected Hall Street's appeal and granted Mattel's appeal. It remanded this case with orders to enter judgment for Mattel unless the district court found grounds under the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 10, 11) to vacate, modify or correct the arbitrator's first decision. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 03-35525, No. 03-35526, 2004 U.S. App. LEXIS 23993 (9th Cir. Nov. 16, 2004) (unreported). Hall Street filed a petition for rehearing *en banc*, which was denied.

Remand to the District Court: In February 2005, the district court sent a letter to both parties indicating its "intent to confirm the original arbitration award" and

enter judgment for Mattel. (ERA 271-72.)[3] The court granted Hall Street the opportunity to submit any written objections to confirmation and two extensions of time for its submittal. (ERA 271-72.)

On March 25, 2005, Hall Street filed its objections and a brief. (ERA 326.) On April 1, 2005, Mattel wrote the court stating that Hall Street's objections failed to meet the standard set forth in the remand order and requested permission to file a response to Hall Street's brief. (ERA 273.)[4] On April 11, 2005, the court entered a minute order that Hall Street's objections were under advisement without allowing Mattel to file a response. (ERA 274.)

Judgment on Remand: The district court did not follow the remand order. With briefing only from Hall Street, the district court adopted Hall Street's argument that the arbitral decision was "implausible," vacated the arbitration award and entered judgment for Hall Street. (ERA 275-89.)[5] The court awarded Hall Street additional attorneys' fees and costs. (ERA 306-10.)

Second Appeal to the Ninth Circuit: On August 1, 2006, the Ninth Circuit reversed the district court, holding that "implausibility" is not a ground for reversal of an arbitral decision under the FAA. *Hall St. Assocs. v. Mattel,*

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[3] This letter does not appear on the court's docket but is included chronologically in the Excerpts of Record at tab "D."

[4] This letter does not appear on the court's docket but is included chronologically in the Excerpts of Record at tab "E." The district court's June 30, 2005, Opinion and Order indicates that Mattel "responded" to Hall Street's objections. (ERA 276.) The court appears to be referring to Mattel's April 1, 2005, letter.

[5] The judgment is misdated; it appears to reflect the year of the original district court judgment for Hall Street.

Inc., No. 05-35721, No. 05-35906, 2006 U.S. App. LEXIS 19527 (9th Cir. Aug. 1, 2006) (unreported). The Ninth Circuit remanded the case to the district court with instructions to enter judgment and an award of attorney fees and costs to Mattel. Hall Street again filed a petition for rehearing *en banc* which was denied. Hall Street argued only for the "implausibility" standard. None of the arguments raised in its certiorari petition appear in these briefs before the Ninth Circuit.

District Court Enters Judgment Against Hall Street: The district court received briefing and entered judgment for a reduced $1.25 million fee award against Hall Street on February 26, 2007. The district court granted all of Hall Street's arguments for reduction. Hall Street filed another appeal to the Ninth Circuit.

Hall Street Disposes of Its Only Asset: In September 2004, Hall Street sold the Property, its only asset, for $5.4 million. (ERA 296-305.) Hall Street did not disclose its transfer in its briefing before the Ninth Circuit or the district court on remand. *See* Hall Street's Objections to Confirmation of Original Arbitration Award on Remand, and Hall Street's motion for an award of supplemental attorneys' fees (CR 150, 159); Fed. R. Civ. P. 26(e) (continuing obligation to make material disclosures).

When challenged with this fact in the district court and Ninth Circuit, Hall Street declined to disclose the whereabouts of the $5.4 million. Following its unsuccessful appeals, Hall Street sought to stay the entry of an award of attorneys' fees and costs against it. The Ninth Circuit considered Hall Street's unexplained asset transfers and refusals to disclose the whereabouts of the proceeds of the sale. It imposed a $400,000 bond requirement on Hall

Street as a condition of a stay. Hall Street failed to post this bond. Hall Street continues to withhold information regarding its status and standing to bring its petition before this Court.

REASONS TO DENY THE PETITION

I. SUMMARY

This landlord-tenant case presents a record that does not merit review by this Court. Hall Street states that the issue is whether private parties can expand the scope of judicial review of an arbitral decision. But it fails to accurately and clearly disclose the basis for its lawsuit. Hall Street asks this Court for an order that its tenant pay to improve conditions that existed before it purchased the property. Hall Street took no cleanup action and sold the property with no showing of diminution of its value. Even if expanded judicial review were allowed as Hall Street requests, the result would be the same judgment against it.

Moreover, Hall Street presents an insufficient record to reverse the arbitral decision. Hall Street does not attack the arbitral findings of fact. The arbitrator heard the evidence and determined the credibility of the witnesses regarding the intention of the parties to the lease. His factual determination that, for purposes of the lease, the parties intended that the tenant not be responsible for contamination that existed prior to the tenancy was correct. His findings also reflect Hall Street's failure to show any damage from the contamination. Those findings are not challenged here.

The arbitrator's findings were supported by an extensive record. Hall Street did not lodge the record with the district court. The reviewing court did not consider it.

Moreover, there has been exhaustive review of Hall Street's claims, through two rounds of arbitration, a district court trial, two hearings to reverse the arbitral decision, two Ninth Circuit appeals, two *en banc* petitions and two proceedings on remand. Yet Hall Street only briefly mentions the points appearing in its petition for certiorari in its first *en banc* petition. Those points were never fully presented to the lower courts and appear for the first time here.

Beyond these infirmities in the record, Hall Street petitions the Court with unclean hands. It is an empty corporate shell that has transferred all its assets. Hall Street has no operations other than to serve as a front for the real parties in interest. It disobeys the orders and judgment of the lower courts while it asks this Court to grant certiorari.

II. THE PETITION SHOULD BE DENIED BECAUSE EVEN IF EXPANDED JUDICIAL REVIEW WERE APPLIED, THE ARBITRAL DECISION WOULD BE AFFIRMED AS CORRECTLY DETERMINING THE INTENT OF THE PARTIES

Even if the arbitration decision were reviewed *de novo* for errors of law, it would stand. This Court's review of the right of private parties to expand the scope of judicial review of an arbitral decision should therefore await an appropriate case in which the plaintiff's claim could be legitimately redressed by the Court's decision.

In this case, the arbitrator made findings of fact that the parties to the lease did not intend that the tenant be obligated to indemnify the landlord for damage that the tenant did not cause; the damage was caused by a chemical the tenant did not use and occurred before the landlord owned the property. (ERA 81-83.) The Ninth Circuit concluded that this decision was neither irrational nor does it manifestly disregard the law under 9 U.S.C. §§ 10, 11. Nor was it an error of law. The arbitrator was the finder of fact and in the best position to determine the intent of the parties to the Lease.

A. The Arbitrator Correctly Made Findings of Fact Regarding the Intention of the Parties

The first arbitration decision provides a detailed analysis rejecting each of Hall Street's claims that Mattel caused or exacerbated the contamination either by its own operations or because they did not test the Property. (ERA 82-83.) In the prior appeal, Hall Street confirmed that the Property was contaminated with TCE before its purchase, and Mattel contributed nothing to this contamination. (ERA 246.)

GAF is cleaning up the Property. Hall Street sold it with no showing of damage. Yet Hall Street persists in demanding payment from its tenant. It points to Sections 12 and 13 of the lease that "[t]o the extent Tenant has been in compliance with applicable environmental laws . . . Tenant shall not be held liable following the expiration of this Lease term for . . . the removal and disposal of any hazardous waste on the Premises. . . ." (ERA 188; ERA 190-91.)

The arbitrator reviewed the full record and concluded that the parties intended that "applicable environmental law" for purposes of the indemnity provision means a law "applicable" to the claim for damage caused by TCE. The arbitrator concluded that tenants did not use TCE and therefore were in compliance with the "applicable environmental laws" as that term was intended to be interpreted by the parties. (ERA 82.)

The arbitrator further found that the tenant's failure to test the well water for contaminants may constitute a violation of other laws, but does not constitute a violation of "applicable environmental laws" regarding TCE damage to the Property. (ERA 82.) Testing the water after the TCE was already released would not protect the landowner from the property damage that had already occurred. The arbitrator held that "*as far as the Lease is concerned*, these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking water, and are not designed to protect landowners from having their property protected from environmental contamination." (ERA 82-83.) (Emphasis added.) (The district court omitted the italicized phrase from its opinion).

In making his decision, the arbitrator properly analyzed the intent of the parties to the lease. In any contract case, the goal is to give effect to the intention of the contracting parties. *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575-76, 931 P.2d 763, 765 (1997) (citing *Inv. Serv. Co. v. Smither*, 276 Or. 837, 843, 556 P.2d 955 (1976) and Or. Rev. Stat. § 42.240 (in construction of a written instrument the intention of the parties is to be pursued if possible)).

The arbitrator's decision is also consistent with the other terms and recitals of the Lease:

- The term "applicable law" was connected in Lease Section 5(b) to the use of the Property and the discharge of hazardous materials. (ER 118, 2FF ¶ 22(a); ER 200).

- The phrase "to the extent" created a limitation on the subsequent words. *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 104-05 (1993); *Or. Account Sys., Inc. v. Greer*, 165 Or. App. 738, 744-45, 996 P.2d 1025, 1029 (2000).

- Section 13 of the Lease provided that the tenant would be responsible only for its own activities and those of its predecessors-in-interest by allocating any defense costs sought by the landlord "based on Tenant's actual contribution to the damages." (ER 120, 2FF ¶ 22(h); ER 180, 3Op 19; ER 209.)

- Under Lease Section 20, the tenant was only required to return the Property in the condition it was leased, not in an improved condition. (ER 121, 2FF ¶ 22(i); ER 217-18.)

- The landlord promised the Property was suitable for the tenant's use in Lease Section 33(h). (ER 122, 2FF ¶ 22(l); ER 222.) *Cantua v. Creager*, 169 Or. App. 81, 96, 7 P.3d 693, 702 (2000) (covenant of quiet enjoyment breached by any act or omission of a landlord that renders the premises substantially unsuitable for the purpose for which they are leased, or that seriously interferes with the beneficial enjoyment of the premises) (citations omitted); *see also Marchese v. Standard Realty & Dev. Co.*, 74

Cal. App. 3d 142, 146, 141 Cal. Rptr. 370, 372 (1977) (interference with tenant's water supply breaches covenant of quiet enjoyment).

- The recitals to the lease, in five places, limited the tenant's indemnity to the landlord to "*its* actions." (ER 117-18, 2FF ¶ 21; ER 197.)[6]

Contract provisions must be read as a whole with the other parts of the Lease and in the context of the parties' dealings to give a reasonable meaning to its terms. *Layman v. Combs*, 994 F.2d 1344, 1352 (9th Cir. 1992); *Holloway v. Holloway*, 63 Or. App. 343, 346-57, 663 P.2d 798, 799-800 (1983).

Hall Street failed to appeal any finding of fact made by the arbitrator. It did not bring the arbitral record before the district court in seeking to vacate the award. Hall Street has never disputed that only the arbitrator, not the district court, heard all the evidence regarding the intent of the parties to the lease.

It may be inferred from Hall Street's failure to lodge the arbitral record in the district court that nothing in the record supports its arguments to this Court. Without such support, Hall Street cannot explain how a reviewing court could select its interpretation of the lease, over an arbitral decision supported by the full evidentiary record.

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[6] The landlord submitted no testimony regarding its interpretation of "applicable environmental law." The landlord's three principals, Mr. Hibbs and Mr. Diamond (both real estate lawyers) and Mr. Eyler, either did not remember the negotiations, or declined to provide testimony on the basis of attorney-client privilege. (ER 052, 237, 239-51, 254-56.)

B. Hall Street Did Not Challenge the Arbitral Findings of Fact But Instead Argued That the Arbitrator Erred Solely as a Matter of Law.

Recognizing the lack of evidence supporting its position, Hall Street argued below that its own interpretation of the lease is the only plausible interpretation "as a matter of law" and that it is based on "plain and common sense." (Hall Street Ninth Circuit Brief dated 2/17/06 at 20.) It can point to no testimony or other evidence that the parties intended the lease to be interpreted as Hall Street now contends. There is no reference to the testimony of the parties or any other evidence presented at the arbitration.

Rather, Hall Street argues that the arbitrator erred as a matter of law in deciding that the Oregon water testing laws were not "applicable environmental laws." Hall Street argues that the Oregon water testing law is an "environmental law" that is "applicable" to Mattel. But that makes the term "applicable" surplusage. All environmental laws are applicable to the tenant.[7] Hall Street however reaches its unfair result that the tenant is responsible for all problems no matter how unrelated to its operations, or how inapplicable to the environmental

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[7] Hall Street argued below that, under the arbitrator's reasoning, no law would qualify as an "applicable environmental law" under the lease because no law is designed solely to protect property owners from property damage. That misconstrues the arbitrator's decision. If the tenant caused property damage by spilling a chemical in violation of the law, it would have failed to comply with a law that was applicable to the claim for damages.

laws that protect against the damage claimed by the landlord.[8]

Hall Street wants a tenant who obtains an incorrect air pollution permit to be liable for any defects to its property, from TCE or otherwise, whether caused by a prior owner or a neighbor.[9] Hall Street argues its tenant should be a super insurance company that is responsible to correct all flaws on the property if it does not comply with *any* environmental law, related or not.

Hall Street therefore must ignore the arbitrator's findings of fact regarding the *intent of the parties.* The arbitrator's findings are based upon the business context and the entirety of the facts regarding the negotiations regarding the lease. He found based upon the testimony and evidence that the phrase "applicable" must be read in that context. His finding provides a fair result.

A court could not reverse fact findings *sua sponte* and make new factual findings. A reviewing court must affirm such findings if the evidence is reasonable, even if it is possible to draw two inconsistent conclusions from the evidence; it cannot assess the credibility of witnesses. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999).

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[8] Section 13 of the lease provided that the tenant would be responsible only for its own activities and those of its predecessors-in-interest by allocating any defense costs sought by the landlord "based on Tenant's actual contribution to the damages." (ERA 190; ERA 164.)

[9] Hall Street conceded at the arbitration that it could not argue that the tenant's failure to comply with an underground storage tank regulation would make tenant responsible for TCE released by a prior property owner. (ERA 237-40.)

The arbitrator was in the best position to discern the intention of the parties, not the reviewing district court. The arbitrator had the full record before him; the court did not. The arbitrator heard all relevant testimony pertaining to this issue; the court did not.[10] No challenge can be raised as a pure issue of law.

III. THE PETITION SHOULD BE DENIED BECAUSE THE ARBITRATOR'S FINDINGS OF FACT DEMONSTRATE THAT HALL STREET FAILED TO ESTABLISH ANY DAMAGES

Expanded judicial review also will not change the arbitral findings regarding Hall Street's failure to prove any compensable damages. The arbitrator found that the Property was contaminated before Hall Street purchased it. (ERA 74, FF ¶ 22.) Hall Street presented no evidence regarding the property condition when the leasehold began. (ERA 77, FF ¶ 41.) Nor did Hall Street show any diminution in property value. Hall Street first proffered then withdrew its only witness (a real estate appraiser) to testify regarding the value of the Property. (ERA 152-53; ERA 236.) It presented no showing of damage either in the purchase or sales price of the Property.

At the hearing before the district court to contest the arbitral decision, Hall Street's counsel Mr. Finn conceded its lack of property damages:

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[10] For example, the evidence in the arbitration shows the landlord initially disagreed with tenant during the lease negotiations, then changed position and agreed at the time of lease signing that tenant would not be responsible for environmental problems it did not cause. (*See, e.g.*, ER 140-41, 145, 149, 277, 287-97.) The landlord proffered no contrary testimony and this evidence was undisputed.

"THE COURT: Is there any evidence that the failure to comply with applicable environmental laws caused any additional property damage?

MR. FINN: Well, there was evidence to that effect. We offered a great deal about that. The arbiter found it was insufficient to reach that conclusion.

THE COURT: Irrespective of any environmental applicable laws, there was no additional property damage?

MR. FINN: That's what he found.

THE COURT: You are bound by that?

MR. FINN: We are."

(ERA 90-91.)

Hall Street also sought indemnity for the cost of defending lawsuits brought against it by the tenant's former employees alleging Hall Street's negligence. But Lease Section 13(a) provides that the tenant is not responsible to indemnify landlord for loss, damage, liability or expense due to landlord's negligence. (ERA 191.)

Hall Street's failure to show its damages is a finding of fact. That finding is not challenged here.

IV. THE PETITION SHOULD BE DENIED BECAUSE HALL STREET DID NOT ADEQUATELY PRESENT ITS ARGUMENTS TO THE LOWER COURTS

The majority of Hall Street's certiorari petition raises arguments it did not present to the lower courts. Hall Street has therefore failed to allow the lower courts properly to review those arguments or to preserve them

for this petition. *See Helvering v. Minn. Tea Co.*, 296 U.S. 378, 380 (1935); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498 (1937).

V. THE PETITION SHOULD BE DENIED BECAUSE OF HALL STREET'S UNCLEAN HANDS

Hall Street was challenged in both the district court and before the Ninth Circuit to explain the September 2004 sale of its only asset, the property at issue in this case, and the whereabouts of the $5.4 million proceeds. The Ninth Circuit specifically directed the parties to submit supplemental letter briefs upon becoming aware of this issue. In response, Hall Street has repeatedly refused to discuss the transfers. Since those transfers, Hall Street has been an empty corporate shell with no assets and no operations.

The district court entered a judgment against Hall Street in this case for $1.23 million on February 26, 2007. Hall Street did not dispute the lease provisions that require it pay the attorney fees and costs to Mattel as the prevailing party.

Hall Street now appears to have no intention of satisfying its lease obligation. As it admitted to the district court, Hall Street was formed as a limited liability corporation to shield its principal, Cascade, from liability. But the privilege of the corporate form was never intended for the instant purposes.

The Ninth Circuit properly concluded that a supersedeas bond was necessary to ensure that Hall Street does not further dispose of its assets before the final judgment and order. The distribution of Hall Street's

assets and other actions it may have taken to render ineffective any judgment against it warrant denial of its petition. *Cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (equity requires petitioners to act "fairly and without fraud or deceit as to the controversy in issue").

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: April 24, 2007

Respectfully submitted,

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(3)

No. 06-989

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IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeal, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Hall Street Associates, L.L.C ("Hall Street") submits this Reply Brief to address new points raised in the Opposition to Petition for Writ of Certiorari ("Opp. Br.") filed by Respondent Mattel, Inc. ("Mattel"). *See* Sup. Ct. R. 15.6 (authorizing reply brief for that purpose).

In its opposition brief, Mattel does not contest that the standards set forth in Supreme Court Rule 10 for the grant of a petition for a writ of certiorari have been met. In fact, the opposition brief is more notable for the arguments that it does not contain than for the arguments that it does contain. Significantly, Mattel does not contest that: (1) there is a wide, irreconcilable and deepening split between the United States

Courts of Appeals over whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, allows parties to agree to non-statutory grounds for vacating an arbitration award; (2) this is an important federal issue in an area of law where there is a particular need for national uniformity; (3) the Ninth Circuit's decision in this case directly conflicts with the decisions of the First, Third, Fourth, Fifth, and Sixth Circuits; and (4) the Ninth Circuit's decision is fundamentally at odds with this Court's cases interpreting the FAA, cases which emphasize freedom of contract and enforcement of arbitration agreements as written.

Ignoring the fundamental factors supporting a decision to grant certiorari, Mattel instead proffers three arguments that border on the frivolous and are utterly unrelated to the merits of Hall Street's certiorari petition. First, Mattel suggests that Hall Street did not preserve error below. Second, notwithstanding the rulings of the district court in Hall Street's favor, Mattel contends that Hall Street would lose on the underlying merits even if this Court concludes that the FAA permits parties to agree to expanded judicial review of arbitration awards. Lastly, Mattel contends that Hall Street somehow has "unclean hands," which makes a grant of certiorari inappropriate. Mattel's arguments are without merit.

REASONS FOR GRANTING THE WRIT

I. Hall Street's Claim of Error Has Been Preserved.

Mattel erroneously states without elaboration that Hall Street did not preserve its arguments. (Opp. Br., p. 10.) Mattel does not identify the arguments that it claims were not raised. However, Mattel does not contest the fact that Hall Street sought expanded judicial review of the arbitrator's decision in the district court pursuant to the parties' arbitration agreement and later urged the Ninth Circuit to uphold the application of that standard of review in connection with the

first appeal filed by Mattel.[1] In fact, Mattel concedes in its opposition brief that "there has been exhaustive review of Hall Street's claims" at all stages of the litigation and, most importantly, that "the points appearing" in Hall Street's petition were, in fact, raised by Hall Street in connection with the first appeal to the Ninth Circuit. (*Id.*)

Hall Street clearly contended throughout the first appeal that the expanded judicial review provision was enforceable under the FAA. Hall Street stated in its initial brief to the Ninth Circuit that it did not concede the correctness of the en banc decision in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), *cert dismissed* 540 U.S. 1098 (2004). Hall Street's Combined Opening Brief and Answering Brief, Case Nos. 03-35525 and 03-35526, p. 31 & n.5. In addition, Hall Street argued vigorously in this brief and during oral argument against application of *Kyocera* and in support of the parties' expanded judicial review agreement. *Id.* at pp. 27-33. The first appeal was the appropriate time to raise the propriety of expanded judicial review and Hall Street clearly raised the issue at that time, as Mattel concedes.

To the extent that Mattel implies that Hall Street was required to raise the same issue in the second Ninth Circuit appeal, Mattel is incorrect. The second appeal was concerned with the issue of whether the district court had correctly applied the FAA's limited standard of review. (App., 132a-133a.) The parties' agreement for expanded judicial review was not an issue because the Ninth Circuit already had ruled that the FAA prohibited enforcement of that agreement. That ruling became "law of the case" for the district court on remand and in the second appeal. Hall Street was therefore

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[1] When the case was first litigated in the district court, the Ninth Circuit permitted parties to agree to expanded judicial review of arbitration awards. *LaPine Tech. Corp v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997). Therefore, no party contested the enforceability of the expanded judicial review provision in that forum. (App., 46a).

not required to challenge the Ninth Circuit's initial ruling on expanded judicial review on remand before the district court or on the second appeal. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (while the Court of Appeals decision in the first case may be "law of the case" for the district court and the Court of Appeals in the second case, the Supreme Court has the authority "to rectify any error that may have occurred in the interlocutory proceedings"). *See also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

Mattel has conceded that Hall Street raised the points appearing in the current petition during the first appeal to the Ninth Circuit. (Opp. Br., p. 10.) Hall Street has continuously argued throughout these proceedings that the expanded judicial review provision was enforceable and against the application of *Kyocera*. Mattel's half-hearted preservation defense is without merit.

II. The Expanded Judicial Review Issue Is Squarely Presented In This Case

Much of Mattel's opposition brief is devoted to arguments on the underlying merits of this case and, particularly, its contention that the arbitrator's decision would be upheld even if subjected to *de novo* review for errors of law. (Opp. Brief, pp. 10-14.) However, Mattel does not argue that anything prevents this Court from reaching the issue presented by Hall Street in its petition.

Mattel's arguments are an attempt to put the proverbial cart before the horse. The threshold issue in this case, and the only issue raised by Hall Street's petition, is the legal standard that the district court must apply in its review of the arbitrator's award. All other issues on the merits of the arbitration decision are secondary to the resolution of this fundamental legal issue, which is squarely before this Court.

None of the issues presented by Mattel regarding the underlying merits of the case need be decided by this Court, which should properly confine itself solely to the standard of review question. Mattel appears to accept this proposition since it does not argue that the issues that it raises on the merits will prevent this Court from deciding the proper standard of review.

Mattel suggests, however, that the Court should not grant the writ because, according to Mattel, it will ultimately prevail on the merits. (Opp. Br., p. 10.) Mattel's confidence in this regard is misplaced because the only court to address its current arguments plainly rejected those arguments. (*See, e.g.*, App., 47A-56A, 105A-110A.)[2] In addition, when the Ninth Circuit reversed the district court's decision setting aside the arbitrator's award under the narrow FAA standard, dissenting Judge Susan Graber stated that the arbitrator's opinion was "completely irrational," while Judge Stephen Reinhardt, writing for the majority, acknowledged that the arbitrator's decision contained possible errors of law. (App. 132A-133A.)

The record establishes that Hall Street is currently saddled with a legally erroneous arbitration decision which is immunized from attack merely because the Ninth Circuit refuses to enforce the mutual and central agreement of the parties to allow *de novo* review of legal issues by the district court. When one considers that the district court approved the

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[2] For instance, the district court already rejected Mattel's contentions stated in its opposition brief that Hall Street did not suffer damages; that the arbitrator made findings of fact regarding intent that are somehow binding on the district court with regards to Hall Street's claim of legal error; that the arbitrator's decision was consistent with other terms and conditions in the lease; and that Hall Street did not timely seek review of the arbitrator's decision. (App. 47a-56a, 105a-110a.) The Ninth Circuit did not review the district court's decisions rejecting these arguments because it disposed of the case solely on the standard of review issue. (App., 115a-116a.)

parties' expanded judicial review agreement in reliance on Ninth Circuit caselaw permitting such agreements, the injustice of the Ninth Circuit's decision is readily apparent. (App., 46a.)

While it is tempting to address and refute Mattel's arguments on the merits in this reply brief, Hall Street will resist the temptation. It suffices to say simply that these issues do not prevent this Court from resolving the split in the circuits on the enforceability of expanded judicial review provisions. Any remaining issues which Mattel presents in its opposition brief do not need to be reached by this Court. These issues were fully briefed by the parties in the Ninth Circuit, were not reached by the Ninth Circuit because it disposed of the appeal solely on the basis of the expanded judicial review issue, and can be determined by the Ninth Circuit on remand if necessary.

III. Mattel's Unclean Hands Defense Is Baseless.

In an exercise of obfuscation to distract attention from the fact that the important issue of federal law presented in Hall Street's petition is undeniably ripe for decision, Mattel casts numerous baseless aspersions against Hall Street which are unsupported by the record. For example, although Mattel alleges that Hall Street has "not complied with" or has disobeyed "the orders and judgments of the lower courts," Mattel fails to identify any order or judgment that Hall Street has disobeyed or not complied with. (Opp. Brief, pp. i, 10.) Mattel cannot identify any such orders because Hall Street has obeyed and complied with all judgments and orders of the lower courts.[3]

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[3] To the extent that Mattel refers to the February 26, 2007 judgment for fees and costs entered in its favor after this petition was filed, Hall Street has filed a precautionary appeal of that judgment with the Ninth Circuit in the event that this Court grants the writ and the judgment is ultimately overturned. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, Ninth Circuit

Mattel's accusations are an attempt to distract this Court from the central legal issue posed by this case: whether the parties are entitled to contract for expanded judicial review of arbitration awards. A review of the facts makes clear that Mattel's accusations are baseless and are without support in the record.

After environmental contamination was discovered on the property, Mattel terminated its lease with Hall Street, leaving Hall Street with vacant industrial property that had been occupied by Mattel and its predecessors for many years. (App., 40a-44a.) Hall Street sold the property in September 2004 when Hall Street had a judgment against Mattel for $810,107.49 and before the Ninth Circuit reversed the district court's original judgment in favor of Hall Street and remanded for further proceedings. (App., 112a-116a.) The remand resulted in an even greater money judgment entered in favor of Hall Street in June of 2005 when the district court again vacated the arbitrator's decision, this time under the FAA standard. (App., 129a-130a.)

There has never been any court order or any other prohibition against Hall Street's sale of its contaminated property. No court has ever questioned the propriety of Hall Street's actions in any way with regard to the sale of the property or the funds resulting from that sale. Nor has Hall Street been reprimanded or sanctioned in any way due to its decision to sell the vacant property which Mattel abandoned or for any other reason.[4]

No. 07-35257. The fact that Hall Street has not paid a disputed money judgment pending this Court's consideration of its petition is not improper and does not constitute a failure to comply with the order or judgments of any court.

[4] While Mattel states, without citation to the record, that Hall Street was "challenged" to explain the sale of the property and account for the proceeds in the district court and the Ninth Circuit, to the extent any such challenge was made, it was made by Mattel, not the courts. (Opp. Br., pp.

Mattel's accusations are unsupported by the record and are beneath the dignity of this Court. Mattel has not established that Hall Street has acted improperly in any way. In addition, Hall Street has not cited any authority to this Court which would indicate that a petition for a writ of certiorari should be denied under the circumstances of this case.[5] Mattel's unclean hands defense has nothing to do with the issue of expanded judicial review of arbitration awards under the FAA and should be disregarded.

IV. Conclusion

Hall Street has established, and Mattel does not contest, that there is a clear and irreconcilable split in the circuits regarding the enforceability of expanded judicial review provisions in agreements to arbitrate. Five circuits enforce these agreements; two others, including the Ninth Circuit, do not. (Hall Street's Petition for a Writ of Certiorari, pp. 11-20.) The legal issue presented by Hall Street's petition is an important issue of federal law in an area where there is a need for national uniformity, a point which Mattel again does not contest. The issue is directly presented by this case and its

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8, 19.) The courts in this proceeding have never questioned Hall Street's integrity in the least, nor have they directed Hall Street to account for the proceeds of the sale. In addition, the implication that the Ninth Circuit imposed a bond requirement upon Hall Street as a condition for a stay of the Ninth Circuit's mandate pending disposition of this petition due to alleged improper behavior is wholly inaccurate. (*Id.*) The Ninth Circuit's order conditioning a stay upon the posting of a bond does not contain any language supporting Mattel's self-serving interpretation.

[5] The sole case cited by Mattel in its opposition on this issue, *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806 (1945), did not apply the unclean hands doctrine to the decision whether to grant a petition for a writ of certiorari. Rather the case is a garden variety application of the unclean hands doctrine in a case where a party guilty of serious misconduct sought equitable relief from the Court. The case has no application here.

ultimate resolution against Hall Street has dictated the case's outcome. Mattel has failed to demonstrate any impediment to this Court's resolution of this legal issue. For these reasons and for the reasons set forth in Hall Street's petition on file with this Court, a writ of certiorari should be granted in this case.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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District Court Opinion and Order, dated April 29, 2002 (Appendix D) 39a

Amended Arbitrator's Findings of Fact and Conclusions of Law on Remand, dated September 3, 2002 (Appendix E) 59a

District Court Opinion and Order, dated May 1, 2003 (Appendix F) 86a

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UNITED STATES DISTRICT COURT

Case No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation, **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/10/2000	1	Complaint against Mattel Inc., Tyco Industries, Inc., Tyco Manufacturing Corp., Tyco Toys, Inc , View-Master Ideal Group, Inc. Filed by Hall Street Associates, L.L.C. (dls,) (Entered: 04/24/2000)
		Notice of Removal receipt #428902. Filed by Mattel Inc., Tyco Industries, Inc., Tyco Manufacturing Corp., Tyco Toys, Inc., View-Master Ideal Group, Inc. (dls,) (Entered: 04/24/2000)
03/17/2000	2	Demand For Jury Trial. Filed by Hall Street Associates, L.L.C.. (dls,) Modified on 4/24/2000 (dls,). (Entered: 04/24/2000)

DATE	NO.	PROCEEDINGS
3/29/2000	5	Answer to Complaint And Affirmative Defenses to Amended Complaint. (Related Doc #1) Filed by Mattel, Inc., Tyco Industries, Inc., Tyco Manufacturing Corp., Tyco Toys, Inc., View-Master Ideal Group, Inc. (dls,) (Entered: 04/24/2000)
06/30/2000	9	Second Amended Complaint For Injunctive Relief And Damages against Mattel Inc., Tyco Industries Inc., Tyco Manufacturing Corp., Tyco Toys, Inc., View-Master Ideal Group, Inc. (related document(s)1) Filed by Hall Street Associates, LL.C. (dls,) (Entered: 7/13/2000)
02/12/2001	28	ORDER ESTABLISHING TRIAL DATES AND PROCEDURES: Pretrial Order due by 3/27/2001. Court Trial set for 4/27/2001 at 09:00AM. (ccs,) (Entered: 02/12/2001)
04/20/2001	42	Record of Hearing. Order Denying Defendants Motion in Limine (Related Doc #30). The court will reserve ruling on admissible matters relating to Robert Hibbs at the time of trial. Signed 4/20/01 by Judge Robert E. Jones. Court Reporter: D. Apodaca. (tomg.) (Entered: 04/25/2001)
04/27/2001	51	Record of Proceedings before Judge Robert E. Jones: Court Trial Day One Court Reporter: K. Eismann (tomg,) (Entered: 05/24/2001)
5/21/2001	50	Findings of Fact and Conclusions of Law: by Judge Robert E. Jones. Signed 5/21/01) (ccs,) (Entered: 05/22/2001)

DATE	NO.	PROCEEDINGS
05/30/2001	53	Motion to Alter/Amend/Correct *Complaint.*, Motion for Reconsideration *(Oral Argument* [sic] *Reuested) (Expedited Hearing Requested).* Filed by Hall Street Associates, L.L.C.. (tomg,) (Entered: 05/30/2001)
06/13/2001	57	Transcript of Proceedings held on 4/27/01, Volume 1 before Judge Robert E. Jones. Court Reporter: Katherine Eismann (tomg,) (Entered: 06/13/2001)
06/26/2001	60	Order:Having reviewed plaintiff's motion and concluded that it raises no new issues, plaintiff's motion for reconsideration and to alter or amend complaint (# 53) is DENIED. The parties are ordered to seek mediation to attempt to resolve the remaining issues in this case.The oral argument set for June 28, 2001, is STRICKEN. by Judge Robert E. Jones. (ccs,) (Entered: 06/26//2001
10/16/2001	62	Order. Arbitrator to be selected by 11/1/01, and this matter concluded by 12/30/01. Signed 10/16/01 by Judge Robert E. Jones, (ccs,) (Entered: 10/17/2001)
10/16/2001	63	Joint Status Report. Filed by Mattel Inc., and Hall Street Associations; (ccs,) (Entered: 10/17/2001)
10/23/2001	64	Stipulation And Order Regarding Agreement To Arbitrate. Signed 10/23/01 by Judge Robert E. Jones. (tomg,) (Entered: 10/29/2001)

DATE	NO.	PROCEEDINGS
01/02/2002	65	Joint Status Report Regarding Arbitration And Request For Minor Revisions To Schedule. Filed by Mattel Inc. (tomg,) (Entered: 01/04/2002)
01/14/2002	66	Arbitrator's Findings of Fact And Conclusions Of Law (FILED UNDER SEAL). (tomg,) (Entered 01/16/2002)
02/01/2002	68	Attorneys' Fees and Costs: Arbitrators Findings of Fact And Conclusions Of Law. (FILED UNDER SEAL). (tomg,) (Entered: 02/02/2002)
02/04/2002	69	Affidavit of James M. Finn. Filed by Hall Street Associates, LL.C. (tomg,) (Entered: 02/11/2002)
02/13/2002	70	Motion for Order Vacating, Modifying And/Or Correcting Arbitration Award (Oral Argument Requested) (FILED UNDER SEAL). Filed by Hall Street Associates, L.L.C. (tomg,) (Entered: 02/13/2002)
02/13/2002	71	Memorandum in Support Of Plaintiffs Motion To Vacate, Modify And/Or Correct Arbitration Award (FILED UNDER SEAL). Filed by Hall Street Associates, LL.C. (Related document(s)70) (tomg) (Entered: 02/13/2002)
02/25/2002	72	Transcript of Proceedings (FILED UNDER SEAL) held on 12/11/2000 before Judge Robert E. Jones. Court Reporter Dennis R. Grube. (FILED UNDER SEAL) (tomg,) Modified on 2/27/2002 (tomg,). (Entered: 02/27/2002)

DATE	NO.	PROCEEDINGS
02/25/2002	73	Response to Motion (filed as Mattel, Inc's., Memorandum Of Points And Authorities (1) in Opposition To Plaintiffs Motion For An Order Vacating, Modifying And/Or Correcting Arbitration Findings Of Fact And Conclusions Of Law; And (2) In Support of Contingent Appeal (FILED UNDER SEAL). Filed by Mattel Inc. (Related motion(s)70 (tomg,) (Entered: 02/27/2002)
03/08/2002	77	Reply to Motion (filed as Plaintiff's Reply Memorandum In Support Of Motion For An Order Vacating, Modifying And/Or Correcting Arbitration Award) (FILED UNDER SEAL). Filed by Hall Street Associates, L.L.C. (Related motion(s)70) (tomg,) (Entered 03/08/2002)
03/11/2002	78	Memorandum (filed as Mattel, Inc.'s Supplemental Authority Regarding Footnote 4 Of Its Memorandum In Opposition To Plaintiff's Motion For An Order Vacating, Modifying And/Or Correcting Arbitration Findings Of Fact And Conclusions Of Law) (FILED UNDER SEAL). Filed by Mattel Inc. (Related document(s)73) (tomg,) (Entered 03/13/2002)
03/13/2002	79	Motion to Strike And Response To Mattel, Inc.'s Supplemental Authority (FILED UNDER SEAL). Filed by Hall Street Associates, LL.C. (tomg,) (Entered: 03/13/2002) 03/13/2002)
04/19/2002	80	Transcript of Proceedings held on 4/5/02 before Judge Robert E. Jones. Court Re-

DATE	NO.	PROCEEDINGS
		porter: Dennis W. Apodaca. (FILED UNDER SEAL) (tomg,) Modified on 4/25/2002 (tomg,). (Entered: 04/22/2002)
04/29/2002	82	ORDER: Opinion and Order (FILED UNDERSEAL): Plaintiffs Motion to Vacate is granted and this case is remanded to the arbitrator for further consideration in accordance with this opinion, (Related Doc #70. Plaintiffs Motion to Strike is denied as moot (Related Doc #79) Signed on 4/29/02 by Judge Robert E. Jones. (ccs,) Additional attachment(s) added on 5/2/2002 (tomg,). Modified on 5/2/2002 (tomg,). (Entered: 04/20/2002)
08/20/2002	83	Order granting Motion to Release Exhibits to Arbitrator Larry Coady for Use During Remand Proceedings. FILED UNDER SEAL Signed 8/20/02 by Judge Ancer L. Haggerty. (cmm) (Entered: 08/20/2002).
09/18/2002	84	Notice of Request for Review and Modification of Arbitration Decision of 9/3/02. FILED UNDER SEAL. Filed by Mattel Inc., Tyco Industries, Inc., Tyco Manufacturing Corp., Tyco Toys, Inc., View-Master Ideal Group, Inc. (cmm) (Entered: 09/19/2002)
09/19/2002	85	Precautionary Notice of Request for Review and Modification of Arbitration Decision of 9/3/02. Filed by Hall Street Associates, LLC. (cmm) (Entered: 09/19/2002)

DATE	NO.	PROCEEDINGS
11/21/2002	87	Final Arbitration Award FILED UNDER SEAL. Filed by Hall Street Associates, LL.C. (mja,) (Entered: 11/22/2002)
11/25/2002	88	Status Report regarding further proceedings in light of decisions by arbitrator on remand from district court. Filed under Seal. (md,) (Entered: 11/27/2002)
11/26/2002	89	Order Regarding Further Proceedings in Light of Decisions by Arbitrator on Remand from the District Court. FILED UNDER SEAL Signed 11/27/02 by Judge Robert E. Jones. (mja,) (Entered: 12/04/2002)
12/16/2002	90	Motion for an Order Modifying Arbitration Award and for, of Entry of Judgment on the Award as Modified [FILED UNDER SEAL] ORAL ARGUMENT REQUESTED. Filed by Hall Street Associates, LLC. (mja,) (Entered 12/17/2002)
12/16/2002	91	Memorandum in Support of Plaintiffs Motion to Modify Arbitration Award and for Entry Of Judgment FILED UNDER SEAL. Filed by Hall Street Associates, LLC. (Related document(s)90) (mja,) (Entered: 12/17/2002)
12/16/2002	92	Motion filed as: Defendant Mattel, Inc.'s Supplemental Notice and Motion for Review and Modification of Arbitration Decisions (FILED UNDER SEAL) REQUEST FOR ORAL ARGUMENT. Filed by Mattel Inc. (mja,) (Entered 12/17/2002)

DATE	NO.	PROCEEDINGS
12/16/2002	93	Memorandum of Points and Authorities in Support of Motion for Review of Modification of Arbitration Decisions FILED UNDER SEAL Filed by Mattel Inc.; (Related document(s)92) (mja,) (Entered: 12/17/2002)
12/16/2002	94	Appendix to Defendant Mattel, Inc.'s Opening Brief in Support of Its Motions to Review and Modify the Arbitration Decisions FILED UNDER SEAL. Filed by Mattel Inc. (Related document(s)92)(mja,) (Entered: 12/17/2002)
01/24/2003	99	Memorandum of Points and Authorities in Opposition to Plaintiffs Motion to Modify Arbitration Award and for Entry of Judgment FILED UNDER SEAL. Filed by Mattel Inc. (Related document(s)90) (mja,) (Entered: 01/28/2003)
01/27/2003	98	Response filed as: Plaintiffs Opposition to Defendant Mattel, Inc's Motion for Review and Modification of Arbitration Decisions FILED UNDER SEAL. Filed by Hall Street Associates, L.L.C. (Related document(s)92) (mja,) (Entered: 01/28/2003)
02/04/2003	100	Reply Memorandum in Support of Plaintiffs Motion to Modify Arbitration Award and for Entry of Judgment FILED UNDER SEAL. Filed by Hall Street Associates, L.L.C. (Related document(s)90) (mja,) (Entered: 02/04/2003)

DATE	NO.	PROCEEDINGS
02/04/2003	101	Reply Memorandum in Support of Motion for Review and Modification of Arbitration Decision FILED UNDER SEAL. Filed by Mattel Inc. (Related document(s)92) (mja,) (Entered: 02/05/2003)
03/05/2003	103	CIVIL MINUTES:—RECORD OF HEARING Oral argument held on motion [#90] for order modifying arbitration award and motion [#92] for review and modification of arbitration decisions. The court takes the motions under advisement. Court Reporter Amanda LeGore. Plaintiffs Counsel James M. Finn and Michael A. Cohen. Defendant's Counsel Peter Hsiao and Marc Blackman by Judge Robert E. Jones. (Related documents(s) 90, 92) (mja,) (Entered: 03/07/2003)
05/01/2003	104	OPINION AND ORDER: Order Denying Motion (Related Doc #90), Order Granting in part. Denying in part, Motion (Related Doc #92) Signed on 5/1/03 by Judge Robert E. Jones. (mja,) Additional attachment(s) added on 5/5/2003 (mja,) FILED UNDER SEAL. Modified on 5/5/2003 (mja,) (Entered: 05/01/2003)
05/02/2003	105	Judgment: FILED 'UNDER SEAL Signed 5/14/03 by Judge Robert E. Jones. (mja,) (Entered: 05/15/2003)
05/15/2003	106	Judgment: FILED UNDER SEAL Signed 5/14/03 by Judge Robert E. Jones. (mja,) (Entered: 05/15/2003)

DATE	NO.	PROCEEDINGS
06/12/2003	117	Notice of Appeal to USCA order #106 entered on 5/15/03 Filing fee collected. Receipt # 450943 issued. (CADS attached) Filed by Mattel Inc. Transcript due by 8/11/2003. (Related Document(s) 106) (Kirk,) (Entered: 06/13/2003)
06/13/2003	119	Notice of Appeal to USCA from order #50, 104, 106, 60 entered on 5/22/01, 6/26/01, 5/1/03, Filing fee collected. Receipt #450969 issued. Representation Statement and CADS submitted. Filed by plaintiff Hall Street Associates, L.L.C. (th,) (Entered; 06/18/2003)
06/24/2003	124	Order. Signed 6/24/03 by Judge Robert E. Jones. (FILED UNDER SEAL) (Kirk,) (Entered: 06/27/2003)
07/14/2003	133	ORDER: Opinion & Order: Granting Plaintiffs Motion for an Order & Judgment awarding supplemental attorneys' fees, costs & expenses (Related Doc #110). Hall Street is awarded attorneys fees of $47,930.75 & costs & expenses $2,610.62. Signed on 7/14/03 by Judge Robert E. Jones. (Kirk,) (Entered: 07/15/2003)
07/15/2003	130	Arbitration Trial Exhibits (Volume 1) Exhibits #101 thru 113. (FILED UNDER SEAL) (Entered: 7/15/2003)
07/15/2003	131	Arbitration Trial Exhibits (Volume 2 Exhibits 114-190. Filed by Mattel, Inc. (DOCUMENT FILED UNDER SEAL) (Entered: 7/15/2003)

DATE	NO.	PROCEEDINGS
07/15/2003	144	Additions to Trial Exhibit List. Filed by Hall Street Associates, L.L.C. (Kirk,) (DOCUMENT FILED UNDER SEAL) (Entered: 9/18/2003)
07/30/2003	135	Transcript of Arbitration Hearing held on 12/12/01 before Judge Larry T. Coady, Arbitrator. Court Reporter: Naegeli Reporting. (DOCUMENT FILED UNDER SEAL) (Kirk,) (Entered: 07/30/2003)
07/30/2003	136	Transcript of Arbitration Hearing held on 12/13/01 before Judge Larry T. Coady, Arbitrator. Court Reporter: Naegeli Reporting. (DOCUMENT FILED UNDER SEAL) (Kirk,) (Entered: 07/30/2003)
07/30/2003	137	Transcript of Arbitration Hearing held on 12/14/01 before Judge Larry T. Coady, Arbitrator. Court Reporter: Naegeli Reporting. (DOCUMENT FILED UNDER SEAL) (Kirk,) (Entered: 07/30/2003)
08/11/2003	138	Transcript of Proceedings held on 8/20/02 before Judge Larry T. Coady, Arbitrator. Court Reporter: Julie Bennett. (DOCUMENT FILED UNDER SEAL) (Kirk,) (Entered: 08/11/2003)
08/18/2003	139	Transcript of Proceedings held on 9/27/02 before Judge Hearing in front of Arbitrator Larry Coady. Court Reporter: Barbara Shafer. (DOCUMENT FILED UNDER SEAL) (Kirk,) (Entered: 08/21/2003)
08/18/2003	140	Mattel Inc.'s Arbitration Trial Exhibits; Volume I. Exhibits 1-28 (from the Civ.199-

DATE	NO.	PROCEEDINGS
		1815-JO case.) (FILED UNDER SEAL) (Kirk,) (Entered: 08/21/2003)
08/18/2003	141	Notebook Marked Plaintiffs Exhibits; Exhibits 101-149 (FILED UNDER SEAL) (Kirk,) (Entered: 08/21/2003)
09/17/2003	142	Transcript of Proceedings held on 10/27/00 before Judge Robert E. Jones. Court Reporter: Dennis Apodaca. (fh,) (Entered: 09/18/2003)
08/18/2003	145	Plaintiffs Exhibit List. Filed by Hall Street Associates, L.L.C. from the Civil case 99-1815J0. (Volume 2)(Documents #29 70) DOCUMENT FILED UNDER SEAL (Kirk,) (Entered: 09/18/2003)
01/18/2005	147	MANDATE of USCA for the 9th Circuit re Notice of Appeal CA 03-35526 119 and Notice of Appeal CA 03-35525 117: The decision of the District Cour is AFFIRMED in part, REVERSED in part, REMANDED. (Related Document(s): Notice of Appeal, 119, Notice of Appeal 117) (tomg.) (Entered: 02/08/2005)
03/25/2005	150	Objections to Confirmation of Original Arbitration Award on Remand. ORAL ARGUMENT REQUESTED. Filed by Hall Street Associates, L.L.C. (dmd,) (Entered: (3128/2005).
04/11/2005	151	**CIVIL MINUTES: Record of** Order: Objections 150 to confirmation of original arbitration award are under advisement as of 5/13/05. Ordered by Judge Robert E. Jones, 4/11/05. (dmd,) (Entered: 04/13/2005)

DATE	NO.	PROCEEDINGS
06/30/2005	155	Opinion and Order (See 13-page Opinion and Order for details). Signed on 6/29/05 by Judge Robert E. Jones. (dmd,) (Entered: 06/30/2005)
06/30/2005	156	JUDGMENT. Signed on 6/29/05 by Judge Robert E. Jones (dmd,) (Entered: 06/30/2005)
07/07/2005	157	Notice of Appeal to USCA 9th Circuit from Judgment 156 entered 6/30/05. Filing fee in amount of $255.00 collected; Receipt No.4316 issued. Filed by Mattel Inc. (Related Document(s): Judgment 156) (tomg,) (Entered: 07/13/2005)
07/25/2005	164	Declaration of Peter Hsiao and Exhibits Submitted in Opposition to Plaintiff's Motion for Order and Judgment Awarding Supplemental Attorneys' Fees, Costs, and Expenses. Filed by Mattel Inc.. (Related document(s): Motion for attorney fees 159.)(dmd,) (Entered: 07/26/2005)
08/19/2005	169	Order—Plaintiffs Motion for Order and Judgment Awarding Supplemental Attorney Fees, Costs and Expenses 159 is GRANTED in PART and DENIED in PART. Signed on 8/18/2005 by Judge Robert E. Jones. (mja,) (Entered: 08/26/2005)
08/19/2005	170	Judgment. Signed on 8/18/05 by Judge Robert E. Jones. (mja,) Entered: 08/26/2005)

DATE	NO.	PROCEEDINGS
08/31/2005	171	Notice of Appeal to USCA 9th Circuit from Judgment 170. Filing fee in amount of $255.00 collected; Receipt No.5243 issued. Filed by Mattel Inc. (See Administrative correction of the Record at document #173). (Related Document(s: Judgment 170) (ecp,) (Entered 09/01/2005)
08/25/2006	175	JUDGMENT of USCA for the 9th Circuit re Notice of Appeal #05-35906 171, and Notice of Appeal #05-35721 157. The decision of the District Court is REVERSED and REMANDED. (Related Document(s): Notice of Appeal, 171, Notice of Appeal 157) (ljl) (Entered: 08/30/2006)
01/03/2007	177	MANDATE of USCA for the 9th Circuit re Notice of Appeal, 171, Notice of Appeal 157. (Related Document(s): Notice of Appeal, 171, Notice of Appeal 157) (ntm) (Entered: 01/05/2007)
02/26/2007	189	Opinion & Order. Signed on 2/26/07 by Judge Robert E. Jones. (ntm) (Entered 02/27/2007)
02/26/2007	190	Judgment. Signed on 2/26/07 by Judge Robert E. Jones. (ntm) (Entered:02/27/2007)
03/23/2007	192	Notice of Appeal to USCA 9th Circuit from Opinion 189 and Judgment 190 entered 2/27/07. Filing fee in amount of $455.00 collected; Receipt No. 14636 issued. Filed by Hall Street Associates, L.L.C.. (Related Document(s): Opinion, Order 189, Judgment 190) (tomg) (Entered: 03/26/2007)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35525
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff- Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

No. 03-35526
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellant,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellee,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/6/03	Filed original and 15 copies Mattel Inc.'s first brief on cross-appeal, (Informal: n) of 24 pages and 5 excerpts of record in 2 vols; served on 10/3/03 [03-35525, 03-35526] (gar) [03-35525 03-35526]
12/19/03	Filed original and 15 copies Hall Street Assoc.'s second brief on cross-appeal (Informal: n) of 74 pages and 5 excerpts of record in I vol; served on 12/18/03. Brief is oversized (see order of 12/15/03) [03-35525, 03-35526] (gar) [03-35525 03-35526]
1/26/04	Filed original and 16 copies Mattel Inc.'s third brief on cross-appeal (Informal: n) of 23 pages and 5 copies suppl excerpts of record in 1 vol; served on 1/23/04 [0335525, 03-35526] (gar) [03-35525 03-35526]
2/20/04	Filed original and 15 copies Hall Street Assoc. reply brief, (Informal: n) of 10 pages and 5 suppl excerpts in 1 vol; served on 2/19/04 [03-35525, 03-35526] (gar) [03-35525 03-355261
11/3/04	ARGUED AND SUBMITTED TO Stephen S. TROTT, Andrew J. KLEINFELD, Louis H. Pollak [03-35525 0335526] (ms)
11/16/04	FILED MEMORANDUM DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Unsigned, Unpublished. All parties shall bear their own costs on appeal. Stephen S. TROTT, Andrew J. KLEINFELD, Louis H. Pollak) FILED AND ENTERED JUDGMENT. [03-35525, 03-35526] (gar) [03-35525 03-35526]

DATE	PROCEEDINGS
12/7/04	[5257295] Filed original and 50 copies Plaintiff Hall Street Assoc.'s petition for panel rehearing and petition for rehearing en bane 14 p.pages, served on 12/6/04 PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES [03-35525, 03-35526] (gar) [03-35525 03-35526]
1/4/05	Filed order (Stephen S. TROTT, Andrew J. KLEINFELD, Louis H. Pollak,): denying petition for enbanc rehearing [5257295-1] [03-35525, 03-35526] (gar) [03-35525 03-35526]
1/12/05	MANDATE ISSUED [03-35525, 03-35526 (gar) [0335525 03-35526]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-35721
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/19/05	Filed original and 15 copies Appellant Mattel Inc. opening brief (Informal: no) 21 pages and five excerpts of record in 2 volumes; served on 12/16/05. [05-35721, 05-35906] (bb) [05-35721 05-3 5906]
2/21/06	Filed original and 15 copies appellee Hall Street Assoc's. 30 page brief, 1 suppl eor vol; served on 2/17/06 [0535721, 05-35906] (bb) [05-35721 05-35906]
3/14/06	Filed original and 15 copies Mattel Inc. in 05-35721, Mattel Inc. in 05-35906 reply brief, (Informal: no) 12 pages; served on 3/13/06 [05-35721, 05-35906] (bb) [0535721 05-35906]
7/25/06	ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Stephen R. REINHARDT, Susan P. GRABER [05-35721, 05-359061 (ms) [05-35721 05-35906]
8/1/06	FILED. MEMORANDUM DISPOSITION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Unsigned, Unpublished. Alfred T. GOODWIN, Stephen R. REINHARDT, Susan P. GRABER) FILED AND ENTERED JUDGMENT. [05-35721, 05-35906] (crw) [05-35721 05-35906]
9/20/06	[5952118] Filed original and 50 copies Appellee Hall Street Assoc.'s petition for panel rehearing and petition for rehearing en banc 13 p.pages, served on 9/19/06 (PANEL, ALL ACTIVE JUDGES AND INTERESTED JUDGES) (bb) [05-35721 05-35906]

DATE	PROCEEDINGS
10/17/06	Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Susan P. GRABER,): The petition for rehearing en banc is DENIED. [5952118-1] [05-35721, 05-35906] (bb) [05-35721 05-35906]
10/23/06	Filed Aplc Hall Street Assoc.'s motion to stay the mandate. served on 10/20/06 (PANEL) [5985887] (bb) [05-35721 05-35906]
10/27/06	Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Susan P. GRABER,): granting appellee's motion to stay the mandate pending petition for writ of certiorari. [5985887-1] [05-35721] (bb) [05-35721]
11/6/06	Filed Aplt Mattel's mtn to recall order granting mtn for stay of mandate & opposition to mtn [05-35721, 05-35906] served on 11/3/06 (PANEL) [05-35721, 05-35906] (mhf) [05-35721 05-35906]
11/30/06	Filed order (Alfred T. GOODWIN, Stephen R. REINHARDT, Susan P. GRABER,): Mattel, Inc.'s motion to vacate the stay of mandate is DENIED on the condition that Hall Street Associates post a supersedeas bond within 14 days of the date of this order, in the amount of $400,000.00. [5998339-1] If the bond is timely posted, the stay of mandate will be in place for the period set forth in FRAP 41(d)(2)(B). If the bond is not posted within 14 days, the clerk shall issue the mandate forthwith. (phone, faxed & filed at 4:07 p.m.) [05-35721, 05-35906] (bb) [05-35721 05-35906]

DATE	PROCEEDINGS
12/21/06	MANDATE ISSUED [05-35721, 05-35906] (bb) [0535721 05-35906]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed JUN 30, 2000]

Civil No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation, TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES

PARTIES AND JURISDICTION

1.

Plaintiff Hall Street Associates L.L.C. ("Hall Street Associates") is a Washington limited liability company. Hall Street Associates has paid all fees, obtained all licenses, and performed all acts that are prerequisites to this action.

2.

Defendant Mattel, Inc. ("Mattel, Inc.") is a Delaware corporation doing business in Oregon.

3.

Defendant Tyco Industries, Inc. ("Tyco Industries") is a Delaware corporation which has apparently merged into Mattel, Inc.

4.

Defendant Tyco Manufacturing Corp. ("Tyco Manufacturing") is an Oregon corporation which has apparently merged with a Delaware corporation that subsequently merged into Mattel, Inc.

5.

Defendant Tyco Toys, Inc. ("Tyco Toys") is a Delaware corporation which has apparently merged into Mattel, Inc.

6.

Defendant View-Master Ideal Group, Inc. ("View-Master") is an Oregon corporation which has apparently merged with a Delaware corporation that subsequently merged into Mattel, Inc.

7.

Hall Street Associates is the owner of certain property in Washington County, Oregon commonly known as 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "Premises"). The Premises is legally described in Exhibit 1.

8.

The acts described herein occurred in Washington County, Oregon, or relate to real property located in Washington County, Oregon.

BACKGROUND FACTS

9.

On March 5, 1991, View-Master entered into a Lease Agreement (the "Lease") with Cascade Square Associates,

under which View-Master agreed to lease the Premises from Cascade Square Associates. A true copy of the Lease, maintained in the ordinary course of business, is attached as Exhibit 2, and is incorporated herein by reference. Hall Street Associates is the successor-in-interest to Cascade Square Associates.

10.

The Lease was amended by a First Amendment to Lease Agreement between Cascade Square Associates and View-Master dated April 29, 1996. A true copy of this First Amendment, maintained in the ordinary course of business, is attached as Exhibit 3 (the "First Amendment"), and is incorporated herein by reference.

11.

View-Master, as part of a corporate merger, assigned its interest under the 1991 Lease Agreement, as amended, to Tyco Manufacturing. Tyco Manufacturing agreed to be bound by the 1991 Lease Agreement and the First Amendment.

12.

Tyco Toys, the parent company of Tyco Manufacturing, is a guarantor under the 1991 Lease Agreement. The Guaranty of Performance in the First Amendment states that "The obligation of the Guarantor is a primary and unconditional obligation and shall be enforceable either before or after proceeding against [the Tenant]."

13.

On or about September 5, 1996, Tyco Manufacturing assigned its interest in the 1991 Lease Agreement to Tyco Industries. In the Assignment of Lease, Tyco Manufacturing agreed that it would not be released or relieved from any liability under the Lease. Tyco Toys remained a guarantor under the Lease.

14.

In 1997, Tyco Toys was merged into Mattel, Inc. The surviving entity is Mattel, Inc. Tyco Manufacturing is now a subsidiary of Mattel, Inc.

15.

Paragraph 5(b) of the Lease provides as follows:

> **"Tenant shall comply at its expense with all applicable laws, rules and regulations of any public authority**, including but not limited to those **regarding maintenance, operation, and use of the Premises**, use of machinery and signs on the Premises, **and those regarding discharging hazardous materials of any kind or other waste**." (Emphasis added.)

16.

Paragraph 5(c) of the Lease provides as follows:

> Tenant shall not conduct or permit any activities on the Premises that create a nuisance or damage the reputation of the Premises . . .

17.

Paragraph 8(a) of the Lease provides as follows:

> **"Tenant will, at its sole cost and expense, maintain the Premises and make repairs to the Premises**, including without limitation the heating, ventilating. air conditioning, mechanical, electrical, elevator, and plumbing systems, insulation and fireproofing and prevention systems, structural roof, walls, and foundations, the fixtures and appurtenances to the Premises, other improvements, sidewalks and parking areas as and when required or requested by any governmental agency or **when needed to preserve them in good repair, operating condition, working order and good appearances**, and regardless of whether the repairs are ordinary or

extraordinary, foreseeable or unforeseeable, capital or noncapital, or the fault or not the fault of Tenant, its agents, employees, invitees, visitors, or contractors. **All such repairs will be in quality and class equal to the original work or installations.**" (Emphasis added).

18.

Paragraph 8(b) of the Lease provides as follows:

"Tenant shall not alter the Premises . . . without Landlord's prior written consent which consent shall not be unreasonably withheld. All alterations shall be made in a good and workmanlike manner. . . ."

19.

The term "Premises" is defined at Paragraph 1(a) of the Lease to include:

"The real property legally described on Exhibit A (the "Land") and several buildings, parking and access areas, a water tower, and other improvements which are currently used as a manufacturing, warehouse and office facility (collectively the "Building") commonly known as 8585 S.W. Hall Boulevard, Beaverton, Oregon, and outlined on the drawing attached as Exhibit B."

20.

Paragraph 12(a) of the Lease provides as follows:

"**Tenant shall comply with all federal, state, and local environmental laws and regulations in its use of the Premises**, including but not limited to the Resource Conservation and Recovery Act, as amended (RCRA), and the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA). . . . Tenant shall also assume all responsibility for, and costs associated with, any closure and/or post-closure care required under any permit obtained by Tenant or other-

wise for treatment, storage, or disposal of hazardous wastes." (Emphasis added.)

21.

Paragraph 12(b) of the Lease provides as follows:

"**Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees of hazardous substances as herein defined on the Premises**. Tenant shall immediately notify Landlord in writing of any release of hazardous waste. In addition, **Tenant assumes liability for the use or presence** in the Building materials or **on or about the Premises of any hazardous waste** including but not limited to asbestos or lead. **Tenant assumes all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials** and shall indemnify and defend Landlord, its officers, agents, and employees, against and from any and all losses, costs, damages, expenses (including environmental abatement costs or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials." (Emphasis added.)

22.

Paragraph 12(d) of the Lease provides as follows:

"Hazardous waste, hazardous building materials or hazardous substances for the purposes of this Lease shall be defined to include, but shall not be limited to, the following:

(a) Asbestos or any asbestos containing material.

(b) Any substance defined as "hazardous substance," "hazardous material," or "toxic substance" in

(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(2) the Hazardous Materials Transportation Act, as amended;

(3) the Resource Conservation and Recovery Act, as amended; and

(4) any similar federal, state or local law or regulation now or hereafter in effect.

(c) Polychlorinated Biphenyl's (PCB's).

(d) Flammable or combustible materials.

(e) Radioactive materials.

(f) Infectious wastes."

23.

Defendants have altered or removed certain portions of the structures and fixtures on the Premises without the authorization of Hall Street Associates or its predecessor, in violation of the Lease, including piping and a sump servicing the playdough area in building 900 on the Premises. There are instances in which Hall Street Associates specifically denied permission to alter or remove portions of the structures and fixtures on the Premises, which Defendant Mattel, Inc. summarily ignored.

24.

Hall Street Associates has a property right that entitles Hall Street Associates to use of a specific quantity of the groundwater from the Premises. This right to use groundwater is registered with the State of Oregon.

25.

Defendants failed to maintain or rebuild structures on the Premises, resulting in waste and physical damage to those structures, in violation of the Lease.

26.

Defendants failed to insure the Premises to replacement value, in violation of the Lease. Defendants failed to maintain liability insurance naming hall Street Associates as an additional insured, in violation of the Lease.

27.

Defendants allowed the groundwater production well on the Premises, the water tower on the Premises, the soils, structures, and shallow and deep groundwater resources to become contaminated with a number of pollutants and toxic and hazardous substances, including but not limited to TCE, PCBs, petroleum pollutants, and lead and other metals, in violation of the Lease.

28.

Defendants allowed the soils and shallow and deep groundwater under the Premises to become contaminated with pollutants, including toxic and hazardous substances, in violation of the terms of the Lease. As a direct consequence of this contamination, Hall Street Associates has suffered the loss of its right to withdraw and utilize groundwater.

29.

The Department of Environmental Quality of the State of Oregon ("DEQ") issued an Order on Consent in matter number WMCSR-NWR-98-17 on November 9, 1998 ("Consent Order"). The Consent Order named Defendant Mattel, Inc. as a responsible party. Defendant Mattel, Inc. signed the Consent Order, admitting liability for contamination of the Premises by hazardous and toxic materials, and agreeing to take steps to remediate the environmental damage to the Premises.

30.

Pursuant to the Consent Order, Defendants are required to maintain equipment and perform services on the Premises, for

the purpose of remediating environmental violations, for a period of time exceeding that stated in the Lease.

31.

In order to maintain the equipment and perform the services on the Premises required by the State of Oregon, Defendants must become a holdover tenant, upon the expiration of the Lease.

32.

Defendants and Hall Street Associates have been sued by third parties who claim to have been injured by toxic or hazardous materials that Defendants imported through the production well or otherwise allowed to accumulate on the Premises.

33.

Defendants refused to accept tender of or indemnify Hall Street Associates against lawsuits brought by third parties relating to toxic or hazardous materials that Defendants imported onto and allowed to accumulate on the Premises, in violation of the Lease. * * *

34.

Defendants failed to reimburse Hall Street Associates for costs incurred by Hall Street Associates, which are currently in excess of $300,000, relating to Defendants' violation of environmental laws and regulations.

35.

On May 31, 2000, defendant Mattel, Inc. served a notice on Hall Street Associates purporting to terminate the term of the Lease, effective as of May 31, 2001.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment)

36.

There is an actual existing controversy between the parties as to the respective rights and obligations of the parties under the Lease. Pursuant to ORS 28.010 *et seq.*, Hall Street Associates is entitled to a declaration that the Lease is a valid enforceable contract, and is binding on the Defendants.

37.

Pursuant to ORS 28.010 *et seq.*, Hall Street Associates is entitled to a declaration that Defendants have an obligation under the Lease to repair and maintain the Premises, so that the Premises are placed in a condition that is equal in quality and class to the original work and installations.

38.

There is an actual existing controversy between the parties to this lawsuit as to whether the Lease requires Defendants to defend and indemnify Hall Street Associates from actions by third parties, relating to the actions of Defendants described herein.

39.

Pursuant to ORS 28.010 *et seq.*, Hall Street Associates is entitled to a declaration that the Lease requires Defendants to indemnify and defend Hall Street Associates from all actions and liability relating to the actions of Defendants and the condition of the Premises described herein, including claims of third parties.

40.

There is an actual existing controversy between the parties to this lawsuit as to whether the Lease requires Defendants to remove or remediate all hazardous or toxic substances on the Premises.

41.

Pursuant to ORS 28.010 *et seq.*, Hall Street Associates is entitled to a declaration that the Lease requires Defendants to remove or remediate all hazardous or toxic substances on the Premises.

42.

There is an actual existing controversy between the parties to this lawsuit as to whether Defendants will remain as a holdover tenant, by locating, installing and maintaining the equipment and performing present and future services on the Premises as may be necessary to fulfill Defendants' obligations to the State of Oregon relating to ongoing environmental remediation and related remedial activities.

43.

Pursuant to ORS 28.010 *et seq.*, Hall Street Associates is entitled to a declaration that Defendants will remain as a holdover tenant, by locating, installing and maintaining the equipment and performing present and future services on the Premises as may be necessary to fulfill the obligations to the State of Oregon relating to ongoing environmental remediation and related remedial activities.

44.

There is an actual existing controversy between the parties to this lawsuit as to the propriety of defendants' purported termination of the Lease, to be effective May 31, 2001.

45.

Pursuant to ORS 28.010 *et seq.*, Hall Street Associates is entitled to a declaration that defendants' purported early termination of the Lease is invalid, ineffective, and contrary to the terms of the Lease.

SECOND CLAIM FOR RELIEF

(Injunction)

46.

Defendants have breached the Lease by failing to maintain the Premises, by allowing waste and damage to the Premises, and by allowing the Premises to become contaminated with hazardous and toxic substances.

47.

Hall Street Associates is entitled to temporary and permanent injunctive relief, requiring Defendants to restore the Premises to its original condition.

THIRD CLAIM FOR RELIEF

(Breach Of Lease)

48.

Defendants failed to maintain and repair the Premises as required under paragraph 8(a) of the Lease, which constitutes a material breach of the Lease. Defendants' failure to maintain and repair includes, without limitation, failure to repair and maintain the heating, ventilating, air conditioning, mechanical, electrical elevator and plumbing systems, insulation and fire proofing and prevention systems, roof, walls, foundations, and other improvements.

49.

On or about May 27, 1997, Hall Street Associates sent Defendants a Notice of Default, notifying the Defendants that they had "failed to repair and maintain the Premises." * * *

50.

Defendants materially breached the Lease by failing to comply with public laws, rules and regulations, including, but not limited to, laws and regulations governing storage and/or release of discharges of hazardous or toxic substances into the

environment and laws and regulations governing water systems, and by releasing hazardous substances onto the Premises in violation of the law.

51.

Defendants materially breached the Lease by altering the Premises without the Landlord's consent.

52.

Defendants materially breached the Lease by conducting activities that caused a nuisance and damaged the reputation of the Premises.

53.

Defendants materially breached the Lease by storing or discharging hazardous substances without notifying the Landlord.

54.

Defendants materially breached the Lease by failing to reimburse Hall Street Associates for expenses it incurred related to the release or presence of hazardous substances on the Premises. Defendants must pay late fees and interest on these expenses pursuant to Paragraph 4 of the Lease, because these expenses are "other sums payable by Tenant to Landlord under this Lease" for the purpose of Paragraph 4.

55.

Defendants materially breached the Lease by failing to accept tender of and indemnify Hall Street Associates from lawsuits brought by third parties, relating to the contamination of the Premises with hazardous and toxic materials by Defendants. * * *

56.

Defendants materially breached the Lease by failing to insure the Premises up to its replacement value. Defendants

materially breached the Lease by failing to provide liability insurance naming Hall Street Associates as an additional insured.

57.

Pursuant to the Lease, Hall Street Associates allowed Defendants to use a valuable water right that is registered with the State of Oregon. Defendants materially breached the Lease by causing substantial damage to this water right and rendering this right unusable.

58.

The breaches of the Lease described above have caused substantial damages to Hall Street Associates, in an amount to be determined at trial, but which are currently estimated as follows:

$7.5 million for damage to and loss of right to withdraw water under Hall Street Associates' water right;

$6.3 million for damage to and necessary repairs of the structures and improvements on the Premises;

$300,000 for unreimbursed expenses incurred by Hall Street Associates in connection with the release or presence of hazardous substances on the Premises; and

$5.5 million for reduction in value on the Premises based on environmental contamination caused or permitted by Defendants and Defendants' failure to repair and maintain the Premises, including without limitation loss of property reputation and property stigmatization.

WHEREFORE, Plaintiff Hall Street Associates requests the following relief:

(a) A Declaration that the Lease is a valid enforceable contract, and is binding on the Defendants.

(b) A Declaration that Defendants have an obligation to repair and maintain the Premises as necessary to

place the Premises in the condition equal in quality and class to its original condition.

(c) A Declaration that the Lease requires Defendants to defend and indemnify Hall Street Associates from all actions by any third parties, relating to the condition of the Premises and the actions of Defendants described herein.

(d) A Declaration that the Lease requires Defendants to remove or remediate all hazardous or toxic substances on, under or about the Premises.

(e) A Declaration that Defendants will remain as a holdover tenant, by locating, installing, maintaining the equipment and performing present and future services and testing on the Premises necessary to fulfill present and future obligations to the State of Oregon relating to environmental remediation and related remedial activities.

(f) A Declaration that Defendants' purported early termination of the Lease is invalid, ineffective, and contrary to the terms of the Lease;

(g) An injunction requiring Defendants to maintain and repair the Premises to the quality and class of its original installation.

(h) Judgment in favor of Hall Street Associates, and against Defendants, jointly and severally, for damages in an amount to be proven at trial.

(i) Judgment in favor of Hall Street Associates, and against Defendants, jointly and severally, for all late fees, delinquency penalties, and similar amounts and costs due under the Lease, and for interest in the amount of 1.5 percent per month for all amounts due under the Lease.

(j) Judgment in favor of Hall Street Associates, and against Defendants, jointly and severally, for plaintiff's reasonable attorneys' fees and costs as provided in the Lease.

(k) Prejudgment interest on all damages at the highest legal rate.

(l) Judgment for such other relief as justice and equity require.

DATED this 30th day of June, 2000.

TONKON TORP LLP

By /s/ Edwin C. Perry
EDWIN C. PERRY
OSB No. 84322
Telephone: 503/802-2026

SHORT CRESSMAN & BURGESS, P.L.L.C.
Richard A. Du Bey
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Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CV 00-355 JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited liability company,
Plaintiff,

vs.

MATTEL, INC., a Delaware corporation,
Defendant.

April 27, 2001
Portland, Oregon
Volume I

APPEARANCES

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* * * *

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBERT E. JONES
UNITED STATES DISTRICT COURT JUDGE

[59] relationship between Cascade Square Associates and Hall Street Associates. In 1998, as I understand, Cascade Square Associates formed Hall Street Associates, correct?

A. Correct.

Q. And Hall Street Associates has all of the assets of Cascade Square Associates, correct?

A. Correct.

Q. And, in fact, the only asset is this Beaverton property, correct?

A. Well, there's cash and other items. But, basically, that's correct.

Q. So, you have these two corporate structures. You have Hall Street Associates, owned wholly by Cascade Square Associates. The purpose for forming Hall Street Associates was to assist in providing protection for the partners of Cascade Square against potential liability, right?

A. Well, your statement that we had these two corporate structures, one of them is a corporation. One of them is partnership. Actually, one of them is a limited liability company. One of them is a partnership.

Hall Street Associates was formed in an effort to shield Cascade Square Associates from any potential liability. That's correct.

Q. And the protection from liability would be for claims asserted arising from the operations on the Beaverton

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington limited liability company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JONES, *Judge*:

Plaintiff Hall Street Associates ("Hall Street") brings this action against defendants Mattel, Inc. ("Mattel") and its predecessors, seeking an order from this court that Mattel is required to meet its contractual obligations through April 30, 2003. The case was tried to the court on April 27, 2001 and April 30, 2001. Having considered the testimony, documentary evidence, and the arguments of counsel, judgment will be entered for Mattel based upon the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Hall Street Associates, L.L.C. is the owner of certain property in Washington County, Oregon, located at 8585 S.W. Hall Boulevard, Beaverton, Oregon (the "Premises"). Hall Street's predecessor in interest is Cascade Square Associates.

2. Defendant Mattel is a Delaware corporation doing business in Oregon. Its predecessors in interest are defendant View-Master Ideal Group ("View-Master"), Tyco Industries, Inc. ("Tyco Industries"), Tyco Manufacturing Corporation ("Tyco Manufacturing") and Tyco Toys, Inc. ("Tyco Toys").

3. On March 5, 1991, View-Master entered into a Lease Agreement (the "Lease") with Cascade Square Associates, pursuant to which Cascade Square Associates agreed to lease the premises to View-Master.

4. The Lease provided that View-Master would lease the premises for commercial purposes for a term of approximately six years.

5. Pursuant to the second paragraph of section 3 of the Lease, the tenant was permitted to terminate its tenancy with one year's notice. Notwithstanding the right to terminate its tenancy, however, the tenant's obligation to "perform its other obligations under the Lease" continued "through May 31, 1997."

6. On April 29, 1996, Cascade Square Associates and View-Master executed an amended lease (the "Amended Lease").

7. Through a series of mergers and assignments among the defendants, Mattel became the tenant in 1997.

8. The Amended Lease specifically amended the Lease in four respects:

a. Paragraph 1.c. of the Lease was amended, such that the "Lease Expiration Date," identified in the Lease as May 31, 1997, was changed to April 30, 2003.

b. Paragraph 1.d. was amended to modify Mattel's rental amount, and to specify rental amounts owed through April 30, 2003.

c. Section 10 of the Lease, entitled "Lien for Rent, was deleted and replaced with a provision entitled "Landlord's Lien." The new provision modified and clarified Hall Street's right to a security interest and lien on property held by Mattel on the Premises in the event that Mattel failed to meet its rent obligations.

d. Paragraph 34, entitled "Completion of Certain Obligations Prior to Termination," was added. Paragraph 34 provided that Mattel was obligated to complete any and all obligations under paragraphs eight (8) and twelve (12) "not later than nine (9) months prior to the Lease Expiration Date."

9. The Amended Lease provided that "other than as amended as set forth, [the Lease] shall continue to be in full force and effect, and all of the terms and conditions in it shall remain effective and enforceable by and between the parties relative to the Premises.

10. Negotiating the Amended Lease were Robert Hibbs for the Landlord and Dennis Wesolowski and Daniel B. Nottage for the Tenant.

11. The Amended Lease was drafted by Hall Street, and specifically, by Robert Hibbs, an attorney and partner of Cascade Square Associates.

12. While the Amended Lease was being negotiated, Michael Kennedy was senior vice-president, secretary and general counsel of Tyco Toys. Mr. Kennedy reviewed a draft of the Amended Lease and concluded that it permitted Tyco Toys to terminate the Amended Lease each year on May 31, provided that one year's notice had been given. Mr. Kennedy conveyed his understanding of that provision to his immediate superior, the chief financial officer of Tyco Toys.

CONCLUSIONS OF LAW

Hall Street seeks enforcement of the Amended Lease through May 31, 2003, on a single legal basis.[1] In its post-trial submission to the court, Hall Street explains that "Plaintiff has presented its case as one in which the court has determined that there is an ambiguity and extrinsic evidence is being presented by both parties to explain the ambiguity. The court may declare the intent of the parties, based on such evidence, and the meaning of the 1996 Amendment as it impacts Section 3 of the 1991 Lease, without resorting to reformation theory."

In this case, the parties concede that the Amended Lease is a completely integrated agreement. "The parol evidence rule, in brief, provides that a binding, completely integrated, written agreement supersedes or discharges all agreements, written or oral, that were made before the completely integrated agreement, to the extent that the prior agreements are within the scope of the completely integrated agreement. Abercrombie v. Hayden Corp., 320 Or. 279, 286, 883 P.2d 845, 850 (1994). Therefore, "if the writing is a complete integration, parol evidence of prior agreements within the scope of the complete integration is inadmissible, whether or not that evidence is consistent with the complete integration." Abercrombie, 320 Or. at 288 (citing Hatley v. Stafford, 284 Or. 523, 535, 588 P.2d 603 (1978)).

Notwithstanding the prohibition of parol evidence in such cases, a factfinder may look to extrinsic evidence to explain the meaning of an ambiguous provision. Abercrombie, 320 Or. at 292 (citing Libby Creek Logging, Inc. v. Johnson, 225 Or. 336, 339, 358 P.2d 491 (1960)). Relying on this exception, Hall Street has presented extrinsic evidence relating to

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[1] Hall Street consistently has refused to advance a "mistake" theory or to seek reformation of the Amended Lease. While I might have been amenable to such a claim, I will not entertain an argument that simply is not before me.

the parties' understanding of the Amended Lease. According to Hall Street, while the Amended Lease states that Mattel is required to meet its rental and other obligations only through May 31, 1997, the parties understood that Mattel was actually obligated through 2003. Essentially, they ask me to negate the May 31, 1997 contained in paragraph 2 of Section 3 of the Amended Lease, and replace it with the date of April 30, 2003. This I cannot do.

While extrinsic evidence is admissible to explain an ambiguity in an agreement, such evidence may not be used to negate an express term of a bargained for, fully integrated agreement. Oregon courts have consistently held that where prior or contemporaneous negotiations or agreements are inconsistent with a term of the written agreement, evidence thereof is inadmissible to negate those inconsistent written terms. See, e.g., Varner v. Eves, 164 Or. App. 66, 990 P.2d 357 (Or. Ct. App. 1999); State of Oregon v. Triad Mechanical, Inc., 144 Or.App. 106, 114 925 P.2d 918, 923 (Or. Ct. App. 1996).

Furthermore, in this case, there is evidence that Mattel relied on the Amended Lease in the form that it was actually drafted. Michael Kennedy, who was general counsel and senior vice-president of Tyco Toys at the time the Amended Lease was negotiated and signed, testified at trial that he understood the date of May 31, 1997 to permit Tyco Toys to terminate the Amended Lease prior to the lease expiration date, providing one year's notice had been given. He also testified that he informed his client of his understanding of the Amended Lease. "If the parties . . . have assented to the writing as the embodiment of their entire agreement, each should be able to rely on the terms of the writing as conclusive evidence of what they have agreed to. Hatley v. Stafford, 284 Or. 523, 531, 588 P.2d 603, 607 (1978).

The cases cited by Hall Street do not warrant the contrary conclusion. In Abercrombie, while the court did state that an

ambiguous provision could be explained by extrinsic evidence, it also noted that "a completely integrated writing may not be contradicted or supplemented by prior terms." 320 Or. at 288. In Moon v. Moon, 140 Or. App. 402, 914 P.2d 1133 (1996), a husband and wife negotiated a divorce settlement, pursuant to which the husband was awarded a particular piece of property specifically identified by its address. There was evidence that both parties assumed that the award included the adjacent property, which was not specifically identified anywhere in the settlement. The court concluded that where the agreement awarded the property "located at" the particular location, it included the adjacent land not specifically identified. Thus, unlike here, there was no express term that had to be negated or ignored in order for the court to reach its conclusion.

In this case, I am faced with a lease that was negotiated over a substantial period of time by highly experienced attorneys. Robert Hibbs, who was primarily responsible for negotiating and drafting both the Lease and the Amended Lease on behalf of Hall Street, had 22 years of legal experience. These are sophisticated parties who had the means and the expertise to negotiate a complete agreement, and to expect that they could rely on it. Based on the language of the Amended Lease, and the evidence before me, I will not now upset the agreement that they themselves have executed.

CONCLUSION

Based on the foregoing, the court concludes that Mattel's notice of termination was valid, and that its obligations to pay rent and other obligations under the Amended Lease cease as of May 31, 2001.

DATED this 21st day of May, 2001.

/s/ ROBERT E. JONES
Robert E. Jones
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed OCT 16, 2001]

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation; **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,
Defendants.

JOINT STATUS REPORT

The parties to this action submit this joint status report regarding this action.

Pursuant to the Court's Order dated June 26, 2001, the parties met on August 15, 2001 to attempt to mediate their dispute before Mediator Edward J. Brunet. The parties were unable to settle the case at this mediation session. At the suggestion of the mediator, however, the parties agreed to seek to reach an agreement by which all remaining issues in the case could be resolved through "contract arbitration"[1] that would require the arbitrator to prepare written findings of fact and conclusions of law and allow for judicial review of the arbitrator's legal rulings, including conclusions of law. The

[1] *See* E. Brunet, "Replacing Folklore Arbitration with a Contract Model of Arbitration," 74 *Tulane Law Review* 39, 65-76 (1999).

agreement will also provide that there will be no further discovery except for an exchange of expert witness' reports and disclosures under the rules provided by the Federal Rules of Civil Procedure.

The parties have prepared and exchanged versions of a draft agreement to arbitrate, to be submitted and approved by the Court, and a draft set of arbitration rules. The parties will submit their agreement to the Court for its approval shortly.

Dated: October 15, 2001.

MARC D. BLACKMAN
RANSOM BLACKMAN LLP
PETER HSIAO
SIEGMUND SHYU
MORRISON & FOERSTER, LLP

By: /s/ Marc D. Blackman
MARC D. BLACKMAN, ESQ.
Attorneys for Defendant
Mattel, Inc.

Dated: October 15, 2001.

JAMES M. FINN
DEBRA MALDONADO
SCHWABE, WILLIAMSON & WYATT

By: /s/ James M. Finn
JAMES M. FINN, ESQ.
Attorneys for Plaintiff
Hall Street Associates, L.L.C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed JAN 2, 2002]

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,

Defendants.

JOINT STATUS REPORT REGARDING ARBITRATION AND REQUEST FOR MINOR REVISIONS TO SCHEDULE

The parties jointly submit this report to the Court to inform it regarding the status of this action.

1. Pursuant to the Court's Order dated October 16, 2001, the parties attended arbitration proceedings on December 12-14, 2001 before Arbitrator Larry T. Coady to resolve the remaining issues in the case. The arbitration hearing record is complete and the matter is under advisement before the Arbitrator.

2. The October 16 Order specified that the arbitration be concluded by December 30, 2001. This is a Sunday. The parties therefore request a one-day extension to December 31, 2001 for the Arbitrator to issue his findings of fact and conclusions of law order.

3. In addition to the substantive issues, the Arbitration Agreement provides for the Arbitrator to designate the prevailing party and award that party its attorneys' fees, costs, and expenses as provided under Section 24 of the Lease. During the arbitration hearing, the parties and the Arbitrator agreed that it would be most efficient to defer the fee issue until after the Arbitrator rendered his findings and conclusions on the parties' substantive claims. The parties therefore request that the Court approve the following schedule for awarding attorneys' fees, costs, and expenses:

January 7, 2002:	Prevailing party submits its fee application.
January 14, 2002:	Opposing party submits its objections.
January 21, 2002:	Prevailing party submits its response.
January 28, 2002:	Arbitrator renders his attorneys' fees award.

Dated: December 27, 2001.

MARC D. BLACKMAN
RANSOM BLACKMAN LLP

PETER HSIAO
SIEGMUND SHYU
MORRISON & FOERSTER, LLP

By: /s/ Marc D. Blackman
MARC D. BLACKMAN, ESQ.
Attorneys for Defendant Mattel, Inc.

Dated: December 27, 2001.

JAMES M. FINN
MICHAEL A. COHEN
DEBRA MALDONADO
SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ James M. Finn
JAMES M. FINN, ESQ.
Attorneys for Plaintiff Hall Street
Associates, L.L.C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON DISTRICT

[Filed FEB 4, 2002]

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,
Defendants.

AFFIDAVIT OF JAMES M. FINN

STATE OF OREGON)
) ss.
County of Multnomah)

I, James M. Firm, being first being duly sworn on oath do depose and say as follows:

1. I am one of the attorneys for plaintiff Hall Street Associates, LLC herein. I make this affidavit from personal knowledge and in regard to Hall Street's response to Mattel's request to enter judgment, without review by the court, on a portion of the arbitrator's decision in this matter.

2. The parties participated in a court ordered mediation in regard to this matter, in August, 2001. The parties failed to settle the case, but did agree to a form of arbitration of the remaining issues in the case. The parties eventually nego-

tiated a stipulation regarding their agreement to arbitration, which was submitted to the court on October 22, 2001.

3. The parties specifically negotiated a schedule for the arbitration, including a hearing date on December 12, 2001 and a date by which the arbitrator's decision in the matter would be rendered, December 30, 2001. At the time of the agreement, and until late December, the parties understood that there would only be one decision by the arbitrator, encompassing all issues before him, including an award of reasonable attorney fees to the prevailing party.

4. One of the primary features of this arbitration agreement was that, unlike ordinary binding arbitration, the arbitration decision would be reviewable by Judge Jones, and then entered as a judgment of the Federal District Court, which would then be reviewable by the 9th Circuit Court of Appeals. The judgment entered by this court would include both the arbitrator's decision and the court's previous decision on the issues in the case which were not arbitrated.

5. The arbitration hearing was not concluded until late in the day on Friday, December 14. Thereafter, it became apparent that it would be unlikely that the arbitrator could decide the substantive issues, as well as decide who the prevailing party was and award reasonable attorney fees and costs to that party, by the December 30 deadline. Therefore, the parties agreed to extend the schedule for the completion of the arbitrator's decision from the end of December to the end of January, 2001, by allowing the arbitrator to complete his decision in two parts. The first part, the decision on the substantive issues, would be due on December 31 (not December 30, which was a Sunday). The parties then set up a briefing schedule for presentation of the attorney fees issue, so that the decision would be made on the attorney fees by January 28 and a final arbitration award could be entered at that time.

6. At no time in my discussion with the attorneys for Mattel regarding extending the deadline for the completion of the arbitrator's decision did the attorneys for Mattel state that they believed that the effect of the extension would be that any party wishing to review the arbitrator's decision would have to request such review in two stages. In fact, the attorneys for Mattel proposed the language for the joint status report and did not seek to amend paragraph 3 of the Arbitration Agreement stipulation, to provide for two requests for review of each part of the arbitrator's decision. This left in place the parties' understanding, reflected in the original stipulation, that the request for review to this court would not occur until the arbitrator's decision on all issues before him was complete.

7. Mr. Blackman's January 4, 2002 letter to the court forwarding Mr. Coady's findings of fact and conclusions of law is consistent with my understanding that there was one issue remaining to be decided by the arbitrator, that is the award of attorney fees, before the arbitrator's decision would be complete.

/s/ James M. Finn
JAMES M. FINN

SUBSCRIBED AND SWORN to before me this 4th day of February, 2002.

/s/ Beth Gibney
BETH GIBNEY
NOTARY PUBLIC FOR OREGON
My Commission Expires: 5/31/02

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

00-0355-JO

HALL STREET ASSOCIATES, L.L.C.,
Plaintiff,

vs.

MATTEL, INC., *et al.*,
Defendant.

April 5, 2002
Portland, Oregon

APPEARANCES

FOR THE PLAINTIFF: James Finn
Michael Cohen
Attorneys at Law

FOR THE DEFENDANT: Marc Blackman
Peter Hsiao
Attorneys at Law

COURT REPORTER: Dennis W. Apodaca, RPR
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8182

* * * *

Proceedings recorded stenographically,
computer-aided transcription.

[22] I could, in a variety of different ways. One way to put it to the Court is this: Had View-Master tested the water and discovered the TCE at the earliest possible time that they were on the property, it would not have made any difference in the amount of damage that was done on the site. The TCE was already there, it was already released and none of the activities of View-Master changed the configuration, the location, the damage that was done to the property.

THE COURT: What about the use?

MR. HSIAO: That's a fair question. The use is the only thing that would have changed. Remember, the finding of fact of the arbitrator is that none of the use of the TCE of the water on the property made the TCE problem any worse. It didn't spread the TCE, and it didn't exacerbate the problems.

THE COURT: Let's take common sense. Here, I am on the property, and I'm drinking water. It is contaminated with TCE. The contamination is the same, but my use of this is going to hurt me, allegedly, if it could be proved, all through this process.

MR. HSIAO: Yes: If I could talk about that.

THE COURT Up to the date that they quit using it for drinking water.

MR. HSIAO: So what I would like to do here is address the Court's question, first, by putting it in [23] context. What you have done, the Court has separated one type of injury. That is the ingestion of the water from most of the injury which was at issue at the arbitration, which was property damage at the property.

So the water right, the TCE that was in the shallow groundwater or the deep groundwater, in the soil, the remediation of that, all of that would have existed whether the water was tested or not. So in context, the Court's question is appropriate.

How about somebody who drank the water? Why shouldn't the operator indemnify for that? The answer is fact specific to the claims that were made in the arbitration. If the Court will look at that factual record, the claims for indemnity were brought by three workers, three workers who sued only Hall Street and not Mattel for their exposure. What they sued Hall Street for—was they sued Hall Street for Hall Street's negligence in providing contaminated water.

Now, remember Hall Street also has a water testing requirement as the owner of the site. The allegations that were made nowhere mention Mattel. Certainly those workers are free to pursue or file claims against Mattel. There is a whole system of insurance set up in order to deal with those claims.

So for the three claims that the Court points out, [24] personal injury, those three claims were directed only at Hall Street. I think a theme that will run through this discussion, the competing arguments to the Court, one argument is to read sections of the lease in isolation. Our argument is: We have to read the lease together. If we read the lease together, the indemnity provision of the lease has a second provision. The second provision provides that nothing in the lease requires the tenant to indemnify the owner for its own negligence.

The only claim that is made in those three lawsuits is the owner's own negligence. That's why they are not indemnified for the TCE portion.

So If you read the lease together, none of the injury that's claimed by Hall Street, there is no "but for" causation that

you can insert the tenant into for lack of testing the water except for the example the Court pointed out, your ingestion of the water.

On that fact-specific claim, that allegation was the allegation of the negligence of the landlord, which the lease specifically excludes from the indemnity, as you would expect.

In the context, not just of the lease, there is no statute, there is no case, and specifically there is no citation any place in the transcript or anywhere else in the record where Hall Street can point to evidence that was [25] presented at the arbitration that applicable environmental law meant a law that has nothing to do with the existence of the contamination.

Mattel didn't use and View-Master and Tyco didn't use the TCE. But most particularly the theory of the arbitration was that Mattel, Tyco or View-Master spread the TCE. Everyone concedes it was used by those companies. Everyone concedes the problem preexisted for 20 years before View-Master ever got on the site. Everyone concedes that the water was already contaminated; that the soil was already contaminated; that the problem, to the extent it existed, existed without any effect of testing for the water.

The only exception is the one the Court pointed out, which is if you would have found the problem sooner, wouldn't you have been the "but for" causation. And the fact that the Court focuses on causation as to what is an applicable environmental law is exactly the point. That's the core of the case. It is the one point that is not raised anywhere, in the Hall Street opening brief.

Applicability requires this thought of causation. As I told the Court from the initial part, the findings of fact not challenged by Hall Street, is that none of the use, none of the damage was exacerbated or made any worse by the operations of the tenant.

* * * *

[38] obvious use of that term. "The tenant shall comply at its expense with all applicable laws regarding maintenance, operation and use of the premises." That's what applicable means.

12A of the lease required them to comply with all laws having to do with the use of the—excuse me—all environmental laws having to do with the use of the premises. One of those environmental laws is testing requirements. The failure to test led directly to the failure to discover this contamination.

So I think the legal error committed by the arbitrator is absolutely clear; that his conclusion that, A, this was not an environmental law that they violated is just dead wrong; and B, it is an applicable environmental law because it is applicable to their use of the property. It would have prevented—it would have discovered this TCE contamination as much as 16 years before it was discovered and they are, therefore, not entitled to this exception.

THE COURT: Is there any evidence that the failure to comply with applicable environmental laws caused any additional property damage?

MR. FINN: Well, there was evidence to that effect. We offered a great deal about that. The arbiter found it was insufficient to reach that conclusion.

THE COURT: Irrespective of any environmental [39] applicable laws, there was no additional property damage.

MR. FINN: That's what he found.

THE COURT: You are bound by that?

MR. FINN: We are.

THE COURT: You are.

MR. FINN: But again, that's only part of the analysis.

THE COURT: You are. But your only remedy then would be for this Court, No. 1, to declare that the water laws, Clean Drinking Water laws are an environmental law.

MR. FINN: That's right.

THE COURT: And had they been adhered to, then what? Then remand and determine whether you suffered any damages as a result of that?

MR. FINN: Well, no. The remand would be since they were in violation of applicable environmental laws, they do not get the benefit of the exception to the broad indemnity. Therefore, the broad indemnity applies. The Court would have to remand to determine what damages were proven by Hall Street.

THE COURT: I'm asking you what damages are you talking about.

MR. FINN: Those are the damages I mentioned before: The loss of the water right, which he found did occur but did not give us any damages for because of his

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation; **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,
Defendants.

APPENDIX TO DEFENDANT MATTEL, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTIONS TO REVIEW AND MODIFY THE ARBITRATION DECISIONS

* * * *

[SUBJECT TO CONFIDENTIALITY AGREEMENT—NOT TO BE DISCLOSED]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation; **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,
Defendants.

NARRATIVE STATEMENT OF R. MICHAEL KENNEDY, Jr. SUBMITTED AS HIS DIRECT TESTIMONY

* * * *

[Subject to Confidentiality Agreement—Not to be Disclosed]

* * * *

I, R. Michael Kennedy, Jr., declare and state as follows:

1. I am currently Of Counsel in the law firm of Stradley Ronon Stevens and Young LLP in Philadelphia, Pennsylvania. I was formerly the General Counsel of Tyco (1987-1997). I graduated in 1966 from St. Joseph's University with a B.S. in physics, and graduated in 1969 from Villanova University Law School with a J.D. The facts contained in this statement are known to me of my own personal knowledge, except where stated otherwise, and I could competently testify to these facts.

2. At Tyco, I was one of the negotiators for the 1991 Lease between Tenant, Tyco as Guarantor, and Plaintiff for the Beaverton, Oregon Property (the "Property"), and the 1996 Lease Amendment between Tenant, Tyco as Guarantor, and Plaintiff for the Property. I was a signatory for Tyco for both the 1991 Lease and 1996 Lease Amendment.

3. The Lease with Plaintiff was intensely negotiated. The words chosen for the Lease provisions were specific, and mean what they say.

4. One of the issues that was intensely negotiated was our requirement that the tenant in the Property would not be responsible for the actions of GAF or its predecessors, who were previous tenants of the Property. Tyco was exceedingly reluctant to guarantee a lease with such an inequitable condition since GAF or its predecessors were unrelated third parties with no corporate relationship to Tyco. This was a fundamental requirement, and the lease that was eventually signed did not require Tyco to guarantee damages caused by GAF or its predecessors.

5. Attached as Exhibit A is a letter from me to Robert Hibbs regarding our requirement that Tyco not guarantee the actions of GAF or its predecessors, which I recognize as a letter prepared by myself. The letter demonstrates Tyco's concerns that the language Plaintiff was proposing for the indemnity, that Tenant (and Tyco as guarantor) be responsible for actions of "predecessors-in-interest," may be used in the future by Plaintiff to mean GAF or its predecessors, even though GAF or its predecessors were not corporate affiliates of, or predecessors in interest to, Tenant or Tyco.

6. Attached as Exhibit B is an internal Tyco memorandum from me to Arnold Thaler and Harry Pearce regarding how Tyco's concern that it not be responsible for the actions of GAF or its predecessors was met by additional lease language, which I recognize as a document prepared by myself.

7. Specifically, to address Tyco's concerns, I negotiated, and Plaintiff agreed, to add and expand upon two provisions that would not make Tyco responsible for guaranteeing the actions of GAF or its (GAF's) predecessors. First, in Section 13 of the Lease, if the Landlord was sued over failure to comply with environmental laws and the violation occurred outside of the term of the Lease, the Landlord was to seek a "fair and reasonable allocation of defense costs . . . based on Tenant's actual contribution to the damages which are the subject of such suit." This would mean that the Tenant would not be responsible for environmental costs caused by GAF or its predecessors.

8. Second, in Section 13 of the Lease, Tenant would not be held liable following expiration of the Lease for PCB, asbestos, hazardous waste, and other liability that was not caused directly or indirectly by Tenant or it's [*sic*] corporate predecessor-in-interest, View Master Industrial Group, Inc.

9. Another issue that was specifically negotiated was Tyco's requirement that its repair requirement before vacating the premises reflect the requirements of existing law, i.e., that the tenant return the Property in good repair, operating condition, working order, and good appearances, reasonable wear and tear excepted. The lease that was eventually signed comported with existing law. For example, the tenant did not have to construct entirely new buildings or

retrofit the property for future tenant use before vacating the premises.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on December 5, 2001, in Philadelphia, Pennsylvania.

/s/ R. Michael Kennedy, Jr.
R. MICHAEL KENNEDY, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation; **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,
Defendants.

APPENDIX TO DEFENDANT MATTEL, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTIONS TO REVIEW AND MODIFY THE ARBITRATION DECISIONS

* * * *

[SUBJECT TO CONFIDENTIALITY AGREEMENT—NOT TO BE DISCLOSED]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; **TYCO INDUSTRIES, INC.**, a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation; **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,

Defendants.

NARRATIVE STATEMENT OF DENNIS M. WESOLOWSKI SUBMITTED AS HIS DIRECT TESTIMONY

* * * *

[Subject to Confidentiality Agreement—Not to be Disclosed]

* * * *

I, Dennis M. Wesolowski, declare and state as follows:

1. I am currently the Vice President and General Counsel of Fisher-Price, Inc. I was formerly the Vice President and Assistant General Counsel of Tyco. I was at Tyco in various capacities from 1989-1997. I graduated in 1976 from Marquette University with a B.A. in political science, and graduated in 1979 from Marquette University with a J.D. The facts contained in this statement are known to me of my own personal knowledge and if called to testify to those facts, I could competently do so.

2. At Tyco, I was one of the negotiators for the 1991 Lease between Tyco and Plaintiff for the Beaverton, Oregon Property (the "Property"), and the 1996 Lease Amendment between Tyco and Plaintiff for the Property.

3. The Lease between Tyco and Plaintiff was negotiated between the parties. The words chosen for the Lease provisions were specific, and mean what they say.

4. One of the issues that was intensely negotiated was Tyco's requirement that the tenant in the Property would not be responsible for the actions of GAF or its predecessors, who were previous tenants of the Property. Tyco would not sign a lease with such an inequitable condition since GAF or its predecessors were unrelated third parties with no corporate relationship to Tyco. This was a fundamental requirement, and the lease that was eventually signed did not require Tyco to be responsible for damages caused by GAF or its predecessors.

5. Another issue that was specifically negotiated was Tyco's requirement that its repair requirement before vacating the premises reflect the requirements of existing law, i.e., that the tenant return the Property in good repair, operating condition, working order, and good appearances, reasonable wear and tear excepted. The lease that was eventually signed comported with existing law. For example, the tenant did not have to construct entirely new buildings or retrofit the property for future tenant use before vacating the premises.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 30, 2001, in East Aurora, New York.

/s/ Dennis M. Wesolowski
DENNIS M. WESOLOWSKI

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

APPENDIX TO DEFENDANT MATTEL, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTIONS TO REVIEW AND MODIFY THE ARBITRATION DECISIONS

* * * *

[SUBJECT TO CONFIDENTIALITY AGREEMENT—NOT TO BE DISCLOSED]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; **TYCO MANUFACTURING CORP.**, an Oregon corporation; **TYCO TOYS, INC.**, a Delaware corporation; and **VIEW-MASTER IDEAL GROUP, INC.**, an Oregon corporation,

Defendants.

ATTORNEYS' FEES AND COSTS:
ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

* * * *

FINDINGS OF FACT/CONCLUSIONS OF LAW

1. Incorporated herein by reference are the "Amended Arbitrator's Findings of Fact and Conclusions of Law on Remand" issued September 3, 2002, and the "Prevailing Party: Arbitrator's Findings of Fact and Conclusions of Law" issued October 2, 2002.

2. Hall Street is the "prevailing party" in this litigation and is entitled to its reasonable attorneys' fees, costs, and expenses incurred as a result of this litigation pursuant to paragraph 24 of the Lease, which provides in relevant part:

> "If Tenant or Landlord engage the services of an attorney to collect monies due to or bring any action for any relief against the other, declaratory or otherwise,

> arising out of this Lease, ... , the losing party shall pay the prevailing party a reasonable sum for attorneys' fees, costs and expenses in such suit, at trial and on appeal, and **such attorneys' fees, costs and expenses shall be deemed to have accrued on the commencement of such action**." (Emphasis added.)

The emphasized language is clearly intended to allow for attorneys' fees, costs and expenses incurred prior to the commencement of litigation and is not a basis for interest and late fees on such fees and costs from the date of commencement of the litigation.

4. Section 4 of the Lease provides for a 5% late fee and 18% per annum interest on delinquent rent or other sums payable by the tenant. I find that this provision has no application to Section 24 or to any of the issues in this case.

5. Hall Street prevailed on six of the eight claims before the arbitrator. Although the award was significantly less than the amount sought, Hall Street obtained declaratory relief requiring Mattel to indemnify Hall Street for all future costs Hall Street may be required to pay to DEQ or to expend as a result of a DEQ consent decree or order relating to the environmental cleanup of the Property, a substantial victory. Hall Street has properly excluded time and expert witness fees specifically charged in conjunction with the repair issue on which Mattel prevailed.

6. Mattel prevailed on the lease termination issue before the Court. Hall Street has properly excluded from its claim any attorneys' fees or costs associated with the litigation of that issue.

7. The time expended by Schwabe, Williamson & Wyatt (SWW) in behalf of Hall Street and their hourly rates are reasonable. However, considering the factors set forth in ORS 20.075 and considering the criteria set forth in Faubion v. City of Prineville, No. CV-00-976-HU, 2001 U.S. Dist.

LEXIS 19678 (D. Or. Nov. 7, 2001), it is appropriate to reduce the attorney fee award by

* * * *

CONCLUSION

IT IS THEREFORE the Order of the Arbitrator, pursuant to the Arbitration Agreement between the parties, as follows:

1. Hall Street is awarded judgment for attorneys' fees in the sum of $248,684.67 and for costs and expenses in the sum of $85,629.99 against Mattel, Inc.
2. Hall Street's counsel is directed to prepare and submit a form of Arbitration Award incorporating the judgments awarded herein and in the "Amended Arbitrator's Findings of Fact and Conclusions of Law," after reducing the latter judgments by any late fees and interest included therein.
3. Any objections by Mattel's counsel to the form of Arbitration Award will be resolved in summary fashion via conference telephone call.
4. Mattel shall pay the resulting judgment within 30 days of the signing of the Arbitration Award.
5. Interest shall accrue at the statutory rate of 9% from the date of the signing of the Arbitration Award.

Dated this 28th day of October, 2002.

/s/ Larry T. Coady
LARRY T. COADY
Arbitrator

[Arbitration Trial Exhibit 102, filed in Docket No. 130, Hall Street Associates, L.L.C. v. Mattel, Inc. et al, United States District Court for the District of Oregon, Case No. 00-355-JO]

LEASE AGREEMENT
Between
Cascade Square Associates and
View-Master Ideal Group, Inc.

THIS LEASE (the "Lease") made on this 5th day of March, 1991 between CASCADE SQUARE ASSOCIATES, a Washington partnership ("Landlord") and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation, f/k/a View-Master International Group, Inc. ("View-Master" or "Tenant"), a wholly-owned subsidiary of Tyco Toys, Inc.

Recitals

A. Landlord and View-Master are Parties to that certain Lease (the "Original Lease") dated June 1, 1985 for the Premises (described below). Landlord and Tenant wish to terminate the Original Lease and enter into this Lease providing for a longer lease term and the covenants and conditions stated below with Tyco Toys, Inc. as Guarantor.

B. View-Master designed and constructed the Premises as a toy manufacturing facility at a time when it owned the underlying real property. View-Master has been the only party to occupy or conduct business on the Premises. View-Master continued to lease the Premises from Landlord pursuant to the Original Lease which provided that View-Master indemnified Landlord for its actions with respect to the Premises or any condition of the Premises. The parties intended that such indemnity applied to Tenant's actions in constructing the Premises, including its choice of building materials, and all activities with respect to the Premises whether or not they occurred before the date of the Original Lease.

C. In executing this Lease, the parties intend that Tenant shall assume View-Master's obligation to indemnify Landlord under the Original lease, which indemnity obligations shall survive termination of the Original lease, and intend that Tenant shall indemnify Landlord for any actual or potential liability Landlord may be exposed to as a result of Tenant's future actions with respect to the Premises. Because the Premises are a self-contained manufacturing facility constructed and previously owned by View-Master, and because the Original Lease was on a triple net basis, Landlord has not been actively involved in managing the Premises and relied on View-Master's agreement to indemnify Landlord for its actions.

In consideration of the above recitals, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, Landlord and Tenant agree:

1. **LEASE DATA AND EXHIBITS**:

a. Leased Premises. The leased premises (the "Premises") consist of the following:

The real property legally described on Exhibit A (the "Land") and several buildings, parking and access areas, a water-tower, and other improvements which are currently used as a manufacturing, warehouse and office facility (collectively the "Building") commonly known as 8585 S.W. Hall Boulevard, Beaverton, Oregon and outlined on the drawing attached as Exhibit B.

b. Lease Commencement Date. The Lease commencement date is December 1, 1990.

c. Lease Expiration Date. The Lease expiration date is May 31, 1997.

d. Rent. The monthly rent ("Rent") shall be:

December 1, 1990 - January 31, 1992	$62,113.33
February 1, 1992 - January 31, 1994	$68,324.67
February 1, 1994 - January 31, 1996	$75,157.17
February 1, 1996 - May 31, 1997	$82,672.92

e. Permitted Use. The Premises shall be used only for Tenant's toy manufacturing and warehousing and related uses, and for no other purpose or use without the written consent of Landlord.

f. Notice and Payment Addresses:

Landlord: Cascade Square Associates
c/o John G. Eyler
2131 — 86th NE
Bellevue, Washington 98004

with a copy to: Short Cressman & Burgess
Attn: Robert E. Hibbs
3000 First Interstate Center
999 Third Avenue
Seattle, Washington 98104-4008

Tenant: View-Master Ideal Group, Inc.
8585 S.W. Hill Boulevard
Beaverton, Oregon

With a copy to: R. Michael Kennedy, Jr.
Tyco Toys, Inc.
6000 Midlantic Drive
Mt. Laurel, N.J. 08054

2. PREMISES: Landlord leases to Tenant, and Tenant leases from Landlord, upon the terms and conditions herein, those certain Premises described in Section 1(a) hereof located on the Land in Beaverton, Oregon.

3. TERM OF LEASE; TERMINATION OF ORIGINAL LEASE; EXTENSION TERM: The Original Lease shall terminate on the Lease Commencement Date. The Lease shall commence on the Lease Commencement Date specified in Section 1(b) and shall expire on the Lease Expiration Date specified in Section 1(c). The Lease will automatically extend beyond the Lease Expiration Date without further action of the parties for additional, successive terms of one year each (the "Extension Terms"), on the same terms and conditions as set forth herein except that the term will be one year and the Rent will be an amount mutually agreed upon by the parties; provided, that either party may elect to terminate this Lease effective as of the Lease Expiration Date by giving written notice of such termination to the other party at least 24 calendar months prior to the termination date specified in the notice. However, in the event the parties do not agree in writing upon the rental to be paid during an Extension Term at least 22 calendar months prior to the commencement of that extension term, this Lease will automatically terminate at the end of the terms (Fixed and Extension) for which Rent has previously been agreed to by the Parties. Any extended term will commence on the day following expiration of the preceding term.

The preceding portion of this Section 3 notwithstanding, this Lease will be considered to be a year-to-year lease in that Tenant may elect to terminate its tenancy (i.e., occupancy) of the Premises by delivering written notice of such termination to Landlord between 8:00 a.m. and 5:00 p.m. on May 31 of each lease year commencing in 1992. Such termination notice shall be effective twelve (12) calendar months from the date of said Notice. Notwithstanding the giving of the foregoing Notice, Tenant's obligation to pay rent, taxes and other obligations, to maintain and repair the Premises, and to perform its other obligations under the Lease, shall continue through May 31, 1997. Notwithstanding the prior sentence, Landlord and Tenant agree that this provision shall not alter or modify

Landlord's duty, under Oregon law, to mitigate damages in the event of breach of the Lease Agreement.

4. **RENT**: Tenant shall pay Landlord the Rent stated in Section 1(d) and any other payments due under this Lease without demand, deduction or offset, payable in lawful money of the United States in advance on or before the tenth (10th) day of each month to Landlord at the place specified in Section 1(f), or to such other party or at such other address as Landlord may hereafter from time to time designate in writing. Rental for any partial month at the beginning or end of the lease term shall be prorated. Notwithstanding anything herein to the contrary, the rent payable by Tenant shall in no event be less than the Rent specified in Section 1(d) of this Lease.

If any Rent or other sums payable by Tenant to Landlord under this Lease shall not be paid by the fifteenth (15th) day of the month, Tenant shall pay to Landlord in addition to said amount due and for the cost of collecting and handling such late payment an amount, equal to the greater of $100 or five percent (5%) of the delinquent amount. In addition, such delinquent Rent or other sums payable by Tenant shall bear interest at the rate of one and one-half percent (1.5%) per month (unless such amount is in excess of the highest lawful rate permitted under applicable laws in which case the highest lawful rate shall apply) calculated from the original due date of such delinquent amounts to the date of payment.

5. USES:

a. Permitted Use. The Premises are to be used only for the uses specified in Section 1(e) hereof (the "Permitted Use"), and for no other business or purpose without the written consent of Landlord. The interpretation of such stated uses shall be narrowly construed.

b. Compliance with Laws. In connection with such use, Tenant shall comply at its expense with all applicable

laws, rules and regulations of any public authority, including but not limited to those regarding maintenance, operation, and use of the Premises, use of machinery and signs on the Premises, and those regarding discharging hazardous materials of any kind or other waste. Any interruption in use resulting from a governmental agency requiring either Landlord or Tenant to make building repairs or to replace building materials View-Master used in constructing the Premises shall not terminate this Lease or Tenant's obligation to pay Rent.

c. Nuisance. Tenant shall not conduct or permit any activities on the Premises that create a nuisance or damage the reputation of the Premises or Landlord's adjoining property, or are reasonably offensive to Landlord, or other owners or users of adjoining property. Tenant will cooperate with Landlord and provide at Tenant's expense, within sixty (60) days of written notice from Landlord, reasonable sound insulation for any equipment and machinery installed in or upon the premises or the Building subsequent to the date of this Lease, so that adjoining or nearby tenants or users are not unreasonably disturbed by the operation of the bead tank or other equipment or machinery.

d. Increase in Insurance Rates. Tenant will be responsible for any additional costs incurred by Landlord as a result of any change in use of the Premises by Tenant causing an increase in the fire or other insurance rates on Landlord's adjacent property or any change in use of the Premises by Tenant that prevents Landlord from taking advantage of any current or future ruling of the Oregon Insurance Rating Bureau or its successor permitting reduced premium rates for fire insurance policies on any portion of Landlord's adjacent property.

e. Machinery Overloads. Tenant shall refrain from any activity or installing any machinery that will overload the floor or electrical circuits or other components of the Building or create undue stress or strain on any part of the Building. If Landlord believes that there is an overload or undue

stress or strain, Landlord may select a qualified electrical engineer whose opinion will control regarding electrical circuits and a qualified engineer or architect whose opinion will control regarding floor loads or other stresses and any inspections by such persons shall be shared by Landlord and Tenant. In the event that the electrical engineer, engineer or architect finds that the overload, stress or strain is sufficient to potentially endanger or injure the Building. Tenant shall immediately take all, necessary steps to alleviate the overload or relieve the stress or strain, either by reinforcing the Building at tenant's sole expense or by reducing the load in a manner satisfactory to Landlord. If Tenant uses or installs power driven machinery, Tenant will pay for all electricity required to use the equipment and for any additional air conditioning needed as a result thereof.

f. Removal of Snow, Ice, and Debris. Tenant shall keep the sidewalks abutting the Premises and Building entrances free and clear of snow, ice, debris, and obstructions of every Tenant shall keep the roof and drains leading from the roof free and clear of snow, ice, debris, or other obstruction which might overload, damage or endanger the roof or adjoining premises, sidewalks, or streets. In performing such work, Tenant shall take all reasonable precautions to avoid damage.

6. TAXES:

a. Obligation for Payment. Tenant shall timely pay all taxes (collectively the "tax"), including without limitation real estate and personal property taxes and assessments assessed, levied, confirmed, or imposed during the term of this Lease whether or not now customary or within the contemplation of Landlord and Tenant: (1) upon, measured by, or reasonably attributable to the cost or value of Tenant's equipment, furniture, fixtures, and other personal property located in the Premises, or the cost or value of any leasehold improvements made in or to the Premises by or for Tenant

regardless of whether title to such improvements is in Tenant or Landlord; (2) upon or measured by the Rent, including without limitation any gross receipts tax or excise tax levied by the federal government or any other governmental body with respect to the receipt of monthly rent; (3) upon or with respect to Tenant's possessing, leasing, operating, managing, maintaining, altering, repairing, using, or occupying the Premises or any portion of the Premises; (4) upon this transaction or any document to which Tenant is a party creating or transferring an interest or an estate in the Premises; (5) upon the Premises and all personal property, furniture, fixtures, and equipment, and all replacements, improvements, or additions to them, whether owned by Landlord or Tenant; and (6) based in whole or in part on a monthly rent, whether made in addition to or in substitution for any other tax.

Notwithstanding the foregoing, the existing LID established for constructing Cascade Avenue and any other assessments incurred now or in the future, assessed against the Premises and Landlord's adjacent property shall be allocated between Landlord and Tenant in direct proportion to the relative square footage of Landlord's adjoining property identified on Exhibit B and the square footage of the Premises. Further LID's benefitting the Premises and Landlord's adjoining property identified on Exhibit B shall also be allocated in direct proportion to the relative square footage of those properties.

b. Taxes Payable in Installments. Tenant may use any available installment payment plans for special assessments and in such case shall be obligated to pay only those installments falling due prior to the date this Lease expires. Taxes and assessments for the last year of this Lease shall be prorated between Landlord and Tenant on the basis of the portion of the tax year that Tenant occupies the Premises.

c. Other Impositions. Tenant will not be obligated to pay local, state, or federal net income taxes assessed against

Landlord; local, state or federal capital levy of Landlord; or sales, excise, franchise, gift, estate, succession, inheritance or transfer taxes of Landlord.

d. Right to Contest Taxes. Tenant will have the right to contest the amount or validity, in whole or in part, of any tax by appropriate proceedings diligently conducted in good faith, only after paying such tax or posting such security as Landlord may reasonably required in order to protect the Premises or Landlord against loss, liability or forfeiture. Upon the termination of any such proceedings, Tenant will pay the amount of such tax or part of such tax as finally determined, the payment of which may have been deferred during the prosecution of such proceedings, together with any costs, fees, interest, penalties, or other related liabilities. Landlord will not be required to join in any such contest or proceedings unless the provisions of any law or regulations then in effect will require that such proceedings be brought by or in the name of Landlord. In that event Landlord will join in such proceedings or permit them to be brought in its name, however, Landlord will not be subject to any liability for the payment of any costs or expenses in connection with any such contest or proceedings, and Tenant will indemnify Landlord against and save Landlord harmless from any such costs and expenses.

7. UTILITIES: Tenant will pay the appropriate suppliers for all water, gas, electricity, light, heat, telephone, power, and other utilities and communications services used by Tenant on the Premises during the term, whether or not such services are billed directly to Tenant. Tenant will also procure, or cause to be procured, without cost to Landlord, any and all necessary permits, licenses, or other authorizations required for the lawful and proper installation and maintenance upon the Premises of wires, pipes, conduits, tubes, and other equipment and appliances for use in supplying any such service to and upon the Premises and sewer, solid waste or other dis-

posal from the Premises. Landlord, upon request of Tenant, and at the sole expense and liability of Tenant, will join with Tenant in any application required for obtaining or continuing any such services.

8. REPAIRS AND MAINTENANCE:

a. Maintenance of the Premises. Tenant will, at its sole cost and expense, maintain the Premises and make repairs to the Premises, including without limitation the heating, ventilating, air conditioning, mechanical, electrical, elevator, and plumbing systems, insulation and fireproofing and prevention systems, structural roof, walls, and foundations, the fixtures and appurtenances to the Premises, other improvements, sidewalks and parking areas as and when required or requested by any governmental agency or when needed to preserve them in good repair, operating condition, working order and good appearances, and regardless of whether the repairs are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital, or the fault or not the fault of Tenant, its agents, employees, invitees, visitors, or contractors. All such repairs will be in quality and class equal to the original work or installations. If Tenant fails to make such repairs Landlord may make them at the expense of Tenant and such expense will be collectible as additional rent and will be paid by Tenant within fifteen (15) days after delivery of a statement for such expense. Provided, however, Landlord shall have no obligation to make any repairs or make any maintenance on the Premises.

b. Alterations. Tenant shall not alter the Premises nor change the color of the exterior of the Building without Landlord's prior written consent which consent shall not be unreasonably withheld. All alterations shall be made in a good and workmanlike manner, and any alterations and fixtures installed by Tenant shall become a part of the Premises and shall belong to Landlord.

c. Storage. Tenant shall not store anything outside of the Building unless the items stored and the storage areas are approved in writing by Landlord. The design and location of screens for storage areas must be approved in writing by Landlord. Trash and garbage receptacles shall be kept covered and concealed.

d. Regulations. Landlord shall have the right to make and enforce reasonable rules and regulations consistent with this Lease for the purpose of regulating access and vehicular use of the Premises and adjacent property. Copies of such rules and regulations shall be furnished to Tenant and shall be complied with as if part of this Lease.

e. Well Water. Tenant shall pay for the cost of any well water utilized for irrigation purposes on the Cascade Avenue LID property.

f. Signs. During the lease term, Landlord will permit Tenant to maintain signs sufficient to identify the business of Tenant and Tenant's access routes. Tenant will be permitted to maintain existing signs on Landlord's adjoining property, so long as the signs are consistent with Landlord's development of the adjoining property and with reasonable aesthetic standards. If Tenant's access routes change, Landlord will provide adequate replacement locations for Tenant to maintain signs sufficient to identify the business of Tenant and Tenant's access routes. Any changes in the existing or replacement signs or sign locations will be subject to the mutual approval of the parties.

9. ACCESS: Tenant shall permit Landlord and its agents and employees to enter into and upon the Premises at all reasonable times and upon reasonable notice (except in the event of emergency) for the purpose of inspecting the same or for the purpose of repairing, altering or improving the Premises or the Building. Nothing contained in this Section shall

be deemed to impose any obligation upon Landlord not expressly stated elsewhere in this Lease. Landlord shall have the right to enter the Premises for the purpose of showing the Premises to prospective tenants within the period of 180 days prior to the Lease expiration date or any sooner termination of the Lease.

10. LIEN FOR RENT: Tenant hereby grants to Landlord a lien and security interest on all property of Tenant now or hereafter placed in or upon the Premises, and such property shall be and remain subject to such lien and security interest of Landlord for payment of all Rent and other sums agreed herein to be paid by Tenant. The lien and security interest shall be subordinate to the current security interest held by Mid-Atlantic Bank, as agent, and is in addition to and cumulative to any Landlord's liens provided by law. Landlord agrees not to enforce the lien and security interest, until Tenant has defaulted.

11. DAMAGE OR DESTRUCTION:

a. Damage and Repair. If the Building is destroyed and rendered unusable by fire or other casualty and cannot be restored during a 180 day period of construction, then either party may elect to terminate this Lease by giving written notice of such termination to the other party within 60 days following the date of damage. Otherwise, Tenant shall proceed to restore the Building to a condition comparable in function and value to that existing prior to the damage, and the monthly rent shall not be abated. If this Lease is, not terminated, Landlord will disburse the net insurance proceeds to Tenant as restoration progresses, up to the total cost and expenses of restoration, in a manner similar to that in which proceeds of a construction loan are customarily disbursed.

b. Business Interruption. No damages, compensation or claim shall be payable by Landlord for inconvenience, loss of business or annoyance arising from any damage, destruc-

tion, repair, or restoration of any portion of the Premises or of the Building unless such damage was caused solely by the negligence of the Landlord.

c. Tenant Improvements. Landlord will not carry insurance of any kind for the protection of Tenant or any improvements, whether paid for by Landlord or by Tenant, or on Tenant's furniture, fixtures, equipment, improvements or appurtenances and Landlord shall not be obligated to repair any damage thereto or replace the same.

d. Express Agreement. The provisions of this Section shall be considered an express agreement governing any case of damage or destruction of the Building or Premises by fire or other casualty.

12. HAZARDOUS BUILDING MATERIALS AND WASTE:

a. Compliance With Laws. Tenant shall comply with all federal, state, and local environmental laws and regulations in its use of the Premises, including but not limited to the Resource Conservation and Recovery Act, as amended (RCRA), and the Comprehensive Environmental Response Compensation and Liability Act, as amended (CERCLA). If Tenant shall treat, store, or dispose of hazardous wastes on the Premises as defined in RCRA, then Tenant shall obtain any necessary permits and identification numbers for such treatment, storage or disposal and provide Landlord with the identification numbers and copies of the permits. Tenant shall also assume all responsibility for, and costs associated with, any closure and/or post-closure care required under any permit obtained by Tenant or otherwise for treatment, storage, or disposal of hazardous wastes. Tenant shall obtain any necessary permits for any underground storage tanks either existing or additional as required by the Oregon Department of Environmental Quality, and/or the Environmental Protection Agency notify the proper authorities, and provide Landlord with copies of such permits and notifications. Furthermore,

Tenant shall indemnify, hold harmless and defend Landlord against all costs and claims associated with a release or leak of the tank contents whether occurring before the Lease Commencement Date, or during the Lease term.

b. Release of Hazardous Waste. Tenant shall use its best efforts and safety practices to prevent the release by Tenant, its agents or employees of hazardous substances as herein defined on the Premises. Tenant shall immediately notify Landlord in writing of any release of hazardous waste. In addition, Tenant assumes liability for the use or presence in the Building materials or on or about the Premises of any hazardous waste including, but not limited to asbestos or lead. Tenant assumes all responsibility for the investigation and cleanup of any such release or presence or use of hazardous Building materials and shall indemnify and defend Landlord, its officers, agents, and employees, against and from any and all losses, costs, damages, expenses (including environmental abatement costs or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials. Subject to the conditions of Section 12.c. below, this provision shall continue in full force and effect regardless of whether this Lease is terminated pursuant to any other provision or the Premises are vacated by Tenant.

c. To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 12.b. above, Tenant shall not be held liable following the expiration of this Lease term for the following:

(i) the removal, disposal and replacement of electrical transformers on the Premises containing PCB's which transformers have not previously and are not then emitting, or leaking PCB's or other hazardous substances;

(ii) the removal, disposal and replacement of any asbestos which was located on the Premises

prior to Tenant's original occupancy, has not been disturbed since its original installation and is not at the time of the expiration of the Lease term currently in a friable or other condition that it could pose a danger to human health or the environment;

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc. or their agents, officers or employees, visitors or invitees. A determination of causation by a state or federal court which is not subject to further appeal, shall be final as regards to the parties hereto.

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building.

d. Hazardous waste, hazardous building materials or hazardous substances for the purposes of this Lease shall be defined to include, but shall not be limited to, the following:

(a) Asbestos or any asbestos containing material.

(b) Any substance defined as "hazardous substance," hazardous material," or "toxic. Substance" in

(1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(2) the Hazardous Materials Transportation Act, as amended;

(3) the Resource Conservation and Recovery Act, as amended; and

(4) any similar federal, state, or local law or regulation now or hereafter in effect;

(c) Polychlorinated Biphenyl's (PCB's).

(d) Flammable or combustible materials.

(e) Radioactive materials.

(f) Infectious wastes.

13. INDEMNIFICATION AND INSURANCE:

a. Indemnification. Tenant shall defend and indemnify Landlord and save it harmless from and against any and all liablity, damages, costs, or expenses, including attorneys' fees, arising from any act, omission, or negligence of Tenant or its officers, contractors, licensees, agents, servants, employees, guests, invitees, predecessors-in-interest, or visitors in or about the Building or Premises as a result of any act, omission or negligence of Tenant, or its officers, contractors, licensees, agents, servants, employees, guests, invitees, predecessors-in-interest, or visitors, whether occurring in the construction of or choice of building materials for the building, occurring during or prior to the original Lease, during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant.

In the event that Landlord is sued for failure to comply with local, state or federal environmental laws and/or regulations regarding the Premises, and it is alleged the spill or violation occurred over a number of years, some portion of which time is outside of the term of this Lease or the Original Lease, then Landlord shall agree to seek to have the other tenants (whether prior or subsequent to the Lease or Original Lease) pay for their prorated amount of Landlord's defense costs in such suit. Tenant's obligation to defend shall not be delayed but shall be limited to its allocable portion of such

defense costs. Landlord, upon learning of a suit or a potential suit against it under this paragraph shall notify Tenant thereof (the "Notice"). During the following thirty (30) days from such notice the parties shall attempt to negotiate a fair and reasonable allocation of defense costs to be paid by Tenant for such action based on Tenant's actual contribution to the damages which are the subject of such suit. If the parties are unable to agree upon a fair and reasonable allocation then such allocation shall be fixed by an arbiter agreed to by the parties. If the parties cannot agree on a single arbiter, then the allocation shall be fixed by a board of arbiters consisting of one arbiter selected by Landlord, one arbiter selected by Tenant, and a third arbiter selected by the two arbiters so selected (the "Board of Arbiters"). Such Board of Arbiters shall, by a majority vote, determine a fair and reasonable allocation within forty-five (45) days of the Notice and such determination shall be binding upon the parties.

Should either party fail to timely, an arbiter pursuant to this Section, should the two arbiters selected fail to select a third, or should a majority of the Board of Arbiters fail to timely agree upon the allocation, then the allocation shall be determined by the presiding judge of the Superior Court of Washington County, Oregon, before whom either party may bring this issue. Each party shall bear one-half of the cost of (i) the arbiter selected by them jointly, (ii) the Board of Arbiters, or (iii) the arbiter selected by the presiding judge of the Superior Court. Any arbitration of this matter shall be conducted pursuant to the Commercial Case Arbitration Rules of the American Arbitration Association.

To the extent Tenant has been in compliance with applicable environmental laws then, notwithstanding the foregoing language in Section 13.a. above, Tenant shall not be held liable following the expiration of this Lease term for the following

(i) the removal, disposal and replacement of electrical transformers on the Premises containing PCB's which transformers have not previously and are not then emitting or leaking PCB's or other hazardous substances;

(ii) the removal, disposal and replacement of any asbestos which was located on the Premises prior to Tenant's original occupancy, has not been disturbed since its original installation and is not at the time of the expiration of the Lease term currently in a friable or other condition that it could pose a danger to human health or the environment;

(iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant or View-Master Ideal Group, Inc. or their agents, officers or employees, visitors or invitees. A determination of causation by a state or federal court which is not subject to further appeal, shall be final as regards to the portion hereto.

(iv) Any other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc. or their agents, officers or employees, visitors or invitees. A determination of causation by a state or federal court which is not subject to further appeal, shall be final as regards to such causation.

If Landlord decides, at the time of the expiration of the Lease, to demolish or otherwise tear down the Building, and not to relet the Premises, then Tenant shall be liable only for amounts that Tenant would have had to expend had the

Building remained standing and not for any additional costs associated with the demolition or tearing down of the Building.

The foregoing provisions shall not be construed to make Tenant responsible for loss, damage, liability or expense resulting from injuries to third parties to the extent caused by the intentional or negligent acts of Landlord, or its officers, contractors, licensees, agents, or employees.

Landlord shall not be liable for any loss or damage to. person or property sustained by Tenant or other persons, which may be caused by theft, or by any act or neglect of any third parties. In addition, Landlord shall not be liable to Tenant, for any damage to the Premises or for any loss, damage or injury to any property therein or thereon resulting from acts by third parties or occasioned by bursting, rupture, leakage or overflow of any plumbing or other pipes (including, without limitation, water, steam, and/or refrigeration lines), sprinklers, tanks, drains, drinking fountains or washstands or, other similar cause in, above, upon or about the Premises, Building, or the Land.

b. Liability Insurance. Tenant shall, at its own expense, keep and maintain in full force and effect during the term of this Lease, a policy of comprehensive broad form public liability insurance insuring Tenant's activities and those of Tenant's officers, contractors, licensees, agents, servants, employees, guests, invitees or visitors with respect to the Premises, the Building, or the Land against loss, damage or liability for personal injury or death or loss or damage to property with a limit of not less than $1,000,000 for injury to one person in one occurrence, $3,000,000 for injuries to more than one person in one occurrence, and $8,000,000 property damage, or such higher limits as Landlord requires in the reasonable exercise of its discretion from time to time. Insurance required under this Section shall be with companies rated A-XV or better in Best's Insurance Guide. No insurance

policy shall be cancelled or reduced in coverage and each such policy shall provide that it is not subject to cancellation or reduction in coverage except after thirty (30) days prior written notice to Landlord. Tenant shall deliver to Landlord upon the Lease commencement date and from time to time thereafter copies of policies of such insurance or certificates evidencing the existence and amounts of the same naming Landlord as an additional insured or with such other loss payable clauses satisfactory to Landlord. The insurance policies shall contain a contractual liability endorsement referring to this Lease. In no event shall the limit of the policies be considered as limiting the liability of Tenant under this Lease.

c. Property Damage Insurance. Tenant will maintain property damage insurance on Tenant's personal property on the Premises. Tenant will also maintain all risk property damage insurance on the Building and improvements on the Premises at Tenant's expense, on a replacement cost basis and in an amount sufficient to avoid application of any co-insurance clause.

d. Waiver of Subrogation. Whether the loss or damage is due to the negligence of either Landlord or Tenant, their agents or employees, or any other cause, Landlord and Tenant release and relieve the other and their agents or employees, from responsibility for, and waive their entire claim of recovery for (i) any loss or damage to the real or personal property of either located anywhere in the Building or on the Premises, including the Building or Premises itself arising out of or incident to the occurrence of any of the perils which are covered by their respective fire insurance policies, with extended coverage endorsements, or (ii) any loss resulting, from business interruption at the Premises or loss of rental income from the Building or Premises, arising out of or incident to the occurrence of any of the perils which are covered by the business interruption insurance policy and by the loss of rental income insurance policy held by Landlord or Tenant.

Each party shall cause its insurance carriers to consent to such waiver and to waive all rights of subrogation against the other party.

14. ASSIGNMENT AND SUBLETTING:

a. Assignment or Sublease. Tenant shall not assign; mortgage, encumber or otherwise transfer this Lease or sublet the whole or any part of the Premises without in each base first obtaining Landlords written consent, which consent may be withheld in the reasonable exercise of Landlord's discretion. No such assignment subletting or other transfer shall relieve Tenant of any liability under this Lease. Consent to any such assignment, subletting, or other transfer shall not operate as a waiver of the necessity for consent to any subsequent assignment, subletting or transfer. If such consent is requested, Landlord reserves the right to terminate this Lease, or, if consent is requested for subletting less than the entire Premises, to terminate this Lease with respect to the portion for which Such consent is requested at the proposed effective date of such subletting, in which event Landlord shall enter into the relationship of landlord and tenant with any such subtenant or assignee, based on the rent (and/or other compensation) and the term agreed to by such subtenant or assignee and otherwise upon the same terms and conditions of this Lease.

b. Assignee/Sublessee Obligations. As a condition to Landlord's approval, if given, any potential assignee or sublessee otherwise approved by Landlord shall assume all obligations of Tenant under this Lease and shall be jointly and severally liable with Tenant and any guarantor hereof for the payment of Rent and performance of all terms, covenants and conditions of this Lease. In connection with any sublease or assignment, Tenant shall provide Landlord with copies of all assignments, subleases and assumption instruments.

15. LIENS AND INSOLVENCY:

a. Liens. Tenant shall keep the Premises and the Building free from any liens arising out of any work performed and materials ordered or obligations incurred by or on behalf of Tenant and hereby indemnifies and holds Landlord harmless from any liability from any such liens. In the event any lien is filed against the Building, the Premises or the Land by any person claiming by, through or under Tenant, Tenant shall, upon request of Landlord, at Tenant's expense, immediately furnish to Landlord a bond in form and amount and issued by a surety satisfactory to Landlord, indemnifying Landlord, the Building, Premises and the Land against any and costs and expenses, including attorneys' fees, which Landlord could possibly incur as a result of such lien.

b. Insolvency. If Tenant becomes insolvent, voluntarily or involuntarily bankrupt, or if a receiver, or assignee or other liquidating officer is appointed for the business of Tenant, then Landlord may terminate Tenant's right of possession under this Lease at Landlord's option and in no event shall this Lease or any tights or privileges hereunder be an asset of Tenant under insolvency or reorganization proceedings or an asset of the bankruptcy estate in and bankruptcy proceedings. Landlord's right to terminate shall be subject to the laws and procedures of federal or state bankruptcy or insolvency laws.

The appointment of a trustee in bankruptcy or of a receiver for the business or property of Tenant shall be deemed a material default and breach of this Lease by Tenant, unless the trustee or receiver, within ten (10) days after appointment in the case of any delinquency in paying Rent or any other payment required under this Lease, or within sixty (60) days after appointment in the case of any default other than the making of such payments (i) cures any outstanding delinquency or default, (ii) fully compensates Landlord for any loss resulting from such delinquency or default, and (iii)

provides adequate assurances of future performance under this Lease, which assurances may at Landlord's option, depositing with Landlord additional security in a form acceptable to Landlord or the Bankruptcy court and Trustee in an amount not to exceed the equivalent of two (2) months Rent determined at the time of appointment.

16. DEFAULTS:

a. Cumulative Remedies. All rights and remedies of Landlord shall be cumulative, and none shall exclude any other right or remedy allowed by law. In addition to the other remedies provided in this Lease, Landlord shall be entitled to an injunction restraining Tenant from violating or attempting to violate any of the covenants, agreements or conditions of this Lease.

b. Tenant's Right to Cure. Time is of the essence hereof. However, Tenant shall have a period of ten (10) days, from the date of written notice from Landlord to Tenant within which to cure any default in the payment of Rent and other sums due hereunder. Any delinquent Rent or other amounts due under this Lease shall bear interest at the rate of 18% per annum from the date due until paid, unless such rate is higher than the highest lawful rate, in which case the highest lawful rate shall apply. Tenant shall have a period of thirty (30) days from the date of written notice from Landlord to Tenant within which to cure any other default hereunder; provided, however, that with respect to any such default which cannot be cured within 30 days the default shall not be deemed to be uncured if Tenant commences to cure within 30 days and Tenant diligently prosecutes the cure thereof.

c. Vacation and Abandonment. Any vacation or abandonment by Tenant shall be considered a default with no right to cure, allowing Landlord to re-enter the Premises under Section 16(d). Vacation shall be defined as absence from the

Premises for thirty (30) days or more. Abandonment shall be defined as absence from the Premises for five (5) days or more while Tenant is in default.

d. Landlord's Re-Entry. Upon an uncured default of this Lease by Tenant, Landlord, in addition to any other rights or remedies it may have, at its option, may by formal or summary court proceedings enter the Premises or any part thereof, and expel, remove, put out or lock out Tenant or any other persons who may be therein, together with all personal property found therein; and Landlord may terminate this Lease, or it will attempt in good faith from time to time, without terminating this Lease and as agent of Tenant, re-let the Premises or any part thereof for such term or terms (which may be for a term a less than or extending beyond the term hereof) and at such rental or rentals and upon such other terms and conditions as Landlord in its sole discretion may deem advisable, with the right to repair, renovate, remodel, redecorate, alter and change the Premises, Tenant remaining liable therefor and for any deficiency computed as hereinafter set forth. In the case of any default, re-entry and/or dispossession by summary proceedings or otherwise, all Rent and other sums due pursuant to this Lease shall become due thereupon and be paid up to the time of such re-entry or dispossession, together with such expenses as Landlord may incur for attorneys' fees, advertising expenses, brokerage fees and/or putting the Premises in good order or preparing the same for re-rental, together with interest (at the rate of the lesser of 18% or the highest lawful rate) and handling charges thereon accruing from the date of any such expenditure by Landlord.

e. Re-Letting the Premises. At the option of Landlord, rents received by Landlord from such re-letting shall be applied first to the payment of any indebtedness from Tenant, to Landlord other than Rent due hereunder; second to the payment of any costs and expenses of such re-letting and

including, but not limited to, attorneys fees, advertising fees and brokerage fees, and to the payment of any repairs, renovations, remodeling, redecoration, alterations and changes in the Premises; third, to the payment of Rent due and to become due hereunder, and, if after applying said rents there is any deficiency in the Rent to be paid by Tenant under this Lease, Tenant shall pay any deficiency to Landlord monthly on the dates specified herein and any payment made or suits brought to collect the amount of the deficiency for any month shall not prejudice in any way the right of Landlord to collect the deficiency for any subsequent month. The failure or refusal of Landlord to re-let the Premises or any part or parts thereof shall not release or affect Tenant's liability hereunder, nor shall Landlord be liable for failure to re-let, or in the event of re-letting, for failure to collect the rent thereof, and in no event shall Tenant be entitled to receive any excess of net rents collected over sums payable by Tenant to Landlord hereunder. No such re-entry or taking possession of the Premises shall be construed as an election on Landlord's part to terminate this Lease unless Landlord gives Tenant, written notice of such intention. Notwithstanding any such re-letting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach and default. Should Landlord at any time terminate this Lease by reason of any default, in addition to any other remedy it may have, it may recover from Tenant the amount of Rent reserved in this Lease for the balance of the Lease term, as it may have been extended, over the then fair market rental value of the Premises for the same period, plus all court costs and attorneys' fees incurred by Landlord in the collection of the same.

f. Waiver of Redemption Rights. Tenant, for itself, and on behalf of any and all persons claiming through or under it, including creditors of all kinds, waives and surrenders all right and privilege which they or any of them might have under or by reason of any present or future law, to

redeem the Premises or to have a continuance of this Lease for the term hereof, as it may have been extended, after having been dispossessed or ejected therefrom by process of law or under the terms of this Lease or after the termination of this Lease as herein provided.

17. MORTGAGE SUBORDINATION AND ATTORNMENT: This Lease shall be subordinate to any mortgage or deed of trust now existing or hereafter placed upon the Land, the Building or the Premises created by or at the instance of Landlord, and to any and all advances to be made thereunder, and to interest thereon and all modifications, renewals and replacements or extension thereof. ("Landlord's Mortgage"); provided, however, that the holder of any Landlord's Mortgage or any person or persons purchasing or otherwise acquiring the Land, Building or Premises at any sale or other proceeding under any Landlord's Mortgage shall agree to continue this Lease in full force and effect so long as Tenant is not in default under this Lease; and, in such event, Tenant shall attorn to such person or persons. Tenant shall properly execute, acknowledge and deliver documents which the holder of any Landlord's Mortgage may require to effectuate the provisions of this Section. Tenant shall attorn to the purchaser upon any foreclosure under a mortgage or deed of trust secured by the Premises, Building, or Land and shall recognize such purchaser as Landlord under this Lease.

18. REMOVAL OF PROPERTY:

a. Movable Property. Landlord's fixed assets are listed on attached Exhibit C. Tenant shall remove all its movable property and trade fixtures which can be removed without damage to the. Premises prior to the Lease expiration date or sooner termination of this Lease and shall pay Landlord any damages for injury to the Premises or Building resulting from such removal.

b. Immovable Property. In addition to Landlord's fixed assets listed on Exhibit C, all other property in the

Premises and any alterations or additions thereto (including, without limitation, wall-to-wall carpeting, paneling, wall covering, window dressings, coverings or shades, or lighting fixtures and apparatus), whether provided by Landlord or Tenant, and any other article affixed to the floor, wall or ceiling of the Premises shall become the property of Landlord and shall remain upon and be surrendered with the Premises, Tenant hereby waiving all rights to any payment or compensation therefor. If, however, Landlord so requests in writing, Tenant shall, prior to expiration or sooner termination of this Lease, remove such alterations, additions, fixtures, equipment and property placed or installed by it in the Premises as requested by Landlord and will immediately repair any damage, caused by or resulting from such removal, returning the Premises to the condition prevailing at the date the Premises were originally delivered to View-Master under the Original Lease, or as thereafter improved, reasonable use, wear and tear excepted.

c. Failure to Remove Property. If Tenant shall fail to remove any of its property of any nature whatsoever from the Premises at the termination of this Lease or when Landlord has the right of reentry, Landlord may, at its option, remove and store said property without liability for loss thereof or damage thereto, such storage to be for the account and at the expense of Tenant. If Tenant shall not pay the cost of storing any such property after it has been stored for a period of 30 days or more, Landlord may, at its option, sell, or permit to be sold, any or all of such property at public or private sale (and Landlord may become purchaser at such sale), in such manner and at such times and places as Landlord in its sole discretion may deem proper, upon five (5) days notice to Tenant (which notice Landlord and Tenant agree is commercially reasonable), and shall apply the proceeds of such sale; first, to the cost and expense of such sale, including reasonable attorneys' fees actually incurred; second, to the payment of the costs or charges for storing any such property;

third, to the payment of any other sums of money which may then be or thereafter become due Landlord from Tenant under any of the terms hereof; and fourth, the balance, if any, to Tenant.

19 NON-WAIVER: Waiver by Landlord of any breach of any term, covenant or condition of this Lease shall not be deemed to be a waiver of such term, covenant, or condition, or of any subsequent breach of the same or any other term, covenant or condition. The subsequent acceptance by Landlord of Rent or other amounts due by Tenant hereunder shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant, or condition of this Lease, other than the failure of Tenant to pay the particular amount so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such amount.

20. SURRENDER OF POSSESSION: Subject to the terms of Section 11 relating to damage and destruction, upon expiration of the term of this Lease, whether by lapse of time or otherwise, Tenant shall promptly and peacefully surrender the Premises, together with all keys thereto, to Landlord in as good condition as when received by View-Master from Landlord under the Original Lease or as thereafter improved, reasonable use, wear and tear excepted.

21. HOLDOVER: If Tenant shall, without the written consent of Landlord, hold over after the expiration or termination of the term of this Lease, such tenancy shall be deemed to be a month-to-month tenancy, which tenancy may be terminated as provided by law. During such tenancy, Tenant agrees to pay to Landlord twice the rate of rental last charged under this Lease, unless a different rate shall be agreed upon, and to be bound by all of the other terms, covenants and conditions herein specified, so far as applicable. Landlord may elect to treat Tenant as a holdover tenant subject to the provisions of this Section if Tenant fails

to make repairs or remove furniture, furnishings, or trade fixtures which Tenant is required to remove under this Lease.

22. CONDEMNATION:

a. Entire Taking. If all of the Premises or such portions of the Building as may be absolutely necessary for Tenant's use are taken by eminent domain, this Lease shall automatically terminate as of the date title vests in the condemning authority and Tenant shall pay to Landlord all Rents and other payments to that date.

b. Constructive Taking of Entire Premises. In the event of a taking of a material part but less than all of the Building, where Landlord shall reasonably determine that the remaining portions of the Building cannot be economically and effectively used by Tenant (whether on account of physical, economic, or other reasons), Landlord shall forward a written notice to Tenant of such determination not more than sixty (60) days after the date of such taking. The term of this Lease shall expire upon the date Landlord specifies in such notice but hot earlier than sixty (60) days after the date of such notice.

c. Partial Taking. In case of taking of a part of the Premises, or a portion of the Building not absolutely necessary for Tenant's use of the Premises, then this Lease shall continue in full force and effect and the Rent shall be equitably reduced based on the proportion by which the floor area of the Building is reduced, such reduction in Rent to be effective as of the date title to such portion vests in the condemning authority.

d. Awards and Damages. Landlord reserves all rights to compensation for damage to the Premises in any partial, constructive, or entire taking by eminent domain, and Tenant hereby assigns to Landlord any right Tenant may have to such compensation or award, and neither Tenant nor anyone acting on behalf of or through Tenant shall make a claim against

Landlord or the condemning authority for compensation for termination of the leasehold interest or interference with Tenant's business. Notwithstanding the foregoing, Tenant may make a claim, separate from Landlord's, for interruption of business, moving expenses or the taking of any of Tenant's trade fixtures and any proceeds of such claim shall belong to the Tenant.

23. NOTICES: All notices under this Lease shall be in writing and delivered in person or sent by registered or certified mail to Landlord and Tenant at the Notice Addresses set forth in Section 1(f) and to the holder of each and every mortgage or deed of trust on the Building at such place as such holder or Landlord may specify to Tenant in writing, or such other addresses as may from time to time be designated by such parties in writing. Notices shall be deemed effective 72 hours after such mailing.

24. COSTS AND ATTORNEYS' FEES: If Tenant or Landlord engage the services of an attorney to collect monies due or to bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of Rent or other payments due hereunder or possession of the Premises, each party, to the extent permitted by law, waives, trial by jury and the losing party shall pay the prevailing party a reasonable sum for attorneys' fees, costs and expenses in such suit, at trial and on appeal, and such attorneys' fees, costs and expenses shall be deemed to have accrued on the commencement of such action.

25. LANDLORD'S LIABILITY: Notwithstanding anything in this Lease to the contrary, the covenants, undertakings and agreements herein made by Landlord are made and intended not as personal covenants, undertakings and agreements or for the purpose of binding Landlord personally the assets of Landlord except to the extent of Landlord's interest in the Premises but are made and intended for the

purpose of only the Landlord's interest in the Premises as the same may from time to time be encumbered. No personal liability or personal responsibility is assumed nor shall at any time be asserted or enforceable against, Landlord or its partners or their respective heirs, legal representatives, successors. And assigns on account of this Lease or on account of any covenant undertaking or agreement of Landlord in this Lease.

26. LANDLORD'S CONSENT: Whenever Landlord's consent is required under the terms hereof, such consent may not be unreasonably withheld.

27. ESTOPPEL CERTIFICATES: Tenant shall, from time to time, upon written request of Landlord, execute, acknowledge and deliver to Landlord or its designee a written statement stating or certifying if true: The date this Lease was executed and the date it expires; the date the term commenced and the date Tenant accepted the Premises; the amount of monthly Rent and the date to which such Rent has been paid; that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended in any way (or specifying the date and terms of any agreement so affecting this Lease); that this Lease represents the entire agreement between the parties as to this leasing; that all conditions under this Lease to be performed by the Landlord have been satisfied, including, but without limitation, all co-tenancy requirements, if any; that on this date there are no existing claims; defenses or offsets which the Tenant has against the enforcement of this Lease by the Landlord; that no Rent has been paid more than one month in advance; and the amount of any security that has been deposited with Landlord. It is intended that any such statement delivered pursuant, to this paragraph may be relied upon by a prospective purchaser of Landlord's interest or assignee of any mortgage or new mortgagee of Landlord's interest in the Building or Premises. If Tenant shall fail to respond within ten (10) days of re-

ceiving Landlord's written request for such written statement, Tenant shall be deemed to have given the written certificate as above provided without modification and shall be deemed to have admitted the accuracy of any information supplied by Landlord to a prospective purchaser, assignee, or mortgagee, including but not limited to information stating that this Lease is in full force and effect, that there are 'no uncured defaults in Landlord's performance, that the security deposit is as stated in the Lease, and that not more than one month's Rent has been paid in advance.

28. TRANSFER OF LANDLORD'S INTEREST: This Lease shall be assignable by Landlord without the Consent of Tenant. In the event of any transfer or transfers of Landlord's interest in the Premises or in the Building, other than a transfer for security purposes only, the transferor shall be automatically relieved of any and all obligations and liabilities on the part of Landlord accruing from and after the date of such transfer and Tenant agrees to attorn to the transferee.

29. RIGHT TO PERFORM: If Tenant shall fail to pay any sum of money, other than Rent, required to be paid by it hereunder or shall fail to perform any other act on its part to be performed hereunder, and such failure shall continue for ten (10) days after notice thereof by Landlord. Landlord may, but shall not be obligated so to do, and without waiving or releasing Tenant from any of its obligations, make any such payment or perform any such other act. Landlord, in addition to any other right or remedy of Landlord provided by law, shall have the same rights and remedies in the event of the nonpayment of sums due under this Section as in the case of default by Tenant in the payment of Rent.

30. CORPORATE AUTHORITY: Each individual executing this. Lease on behalf of Tenant represents and warrants that he or she is duly authorized to execute and deliver this Lease on behalf of Tenant in accordance with a duly adopted resolution of the Board of Directors of Tenant and in

accordance with the bylaws of Tenant, and that this Lease is binding upon Tenant in accordance with its terms. Tenant shall, within thirty (30) days after execution of this Lease, deliver to Landlord a certified copy of a resolution of the Board of Directors of Tenant authorizing or ratifying the execution of this Lease.

31. Drainage. The Premises and Landlord's adjoining property are both served by a drainage systems which consists of open grates and underground sewers and catch basins. Tenant shall maintain in good condition and repair the portion of such system on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system.

32. Sanitary Sewers. The Premises and Landlord's adjoining property are both served by one unified sanitary sewer system. Tenant shall be responsible for maintaining in good condition and repair the portion of such system located on the Premises and shall be responsible to Landlord pursuant to the indemnity provisions in Section 13 for any materials Tenant discharges into such drainage system.

33. GENERAL:

a. Headings. The section titles are not part of this Lease and shall have no effect upon the construction or interpretation of any part hereof.

b. Heirs and Assigns. All of the covenants, agreements, terms and conditions contained in this Lease shall apply to and be binding upon Landlord and tenant and their respective, heirs, executors, administrators, successors and assigns.

c. No Brokers. Tenant represents and warrants to Landlord that it has not engaged any broker, finder or other person who would be entitled to any commission or fees in respect of the negotiation, execution, or delivery of this Lease

and shall indemnify and hold harmless Landlord against any loss, cost, liability or expense incurred by Landlord as a result of any claim asserted by any such broker, finder or other person on the basis of any arrangements or agreements made or alleged to have been made by or on behalf of Tenant. The provisions of this subparagraph shall not apply to brokers with whom Landlord has an express written brokerage agreement.

d. Entire Agreement. This Lease contains all of the covenants and agreements between Landlord and Tenant relating in any manner to the rental, use and occupancy of the Premises and Tenant's use of the Building and other matters set forth in this Lease. No prior agreements or understanding pertaining to the same shall be valid or of any force or effect, except the indemnity provisions of the Original Lease as specified herein, and the covenants and agreements of this Lease shall not be altered, modified or added to except in writing signed by Landlord and Tenant.

e. Severability. Any provision of this Lease which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision hereof and the remaining provisions hereof shall nevertheless remain in full force and effect.

f. Force Majeure. Time periods for Landlord's performance under any provisions of this Lease shall be extended for periods of time during which the Landlord's performance is prevented due to circumstances beyond the Landlord's control, including without limitation, fires, floods, earthquakes, lockouts, strikes, embargoes, governmental regulations, acts of God, public enemy, war or other strife.

g. Exhibits. The following exhibits are made a part of this Lease:

Exhibit A - Legal description of the Land
Exhibit B - drawing outlining the Premises
Exhibit C - Landlord's Fixed Assets

h. Warranty of Title and Quiet Enjoyment. Landlord warrants that it is the current owner of the Property and has the right to execute this Lease. Landlord further covenants and warrants that at all times during the term hereof, provided Tenant is not in default, Tenant will have full.*

IN WITNESS WHEREOF this Lease has been executed the date and year first above written.

LANDLORD:	**TENANT:**
CASCADE SQUARE ASSOCIATES, a Washington partnership	VIEW-MASTER IDEAL GROUP INC., a Delaware corporation
By /s/ [Illegible] Its General Partner	By /s/ [Illegible] Its Vice President
	Guarantor:
	TYCO TOYS, INC., a Delaware corporation
	By /s/ [Illegible] Its Executive Vice President

Guaranty of Performance. The performance by View-Master Ideal Group, Inc. of each and every covenant and obligation under the foregoing Lease and any assignments, additions, amendments, deletions or extensions thereof, is hereby guaranteed by Tyco Toys, Inc. and its successors and assigns (the "Guarantor"). The obligation of the Guarantor is a primary and unconditional obligation and shall be enforceable either before or after proceeding against View-Master Ideal Group, Inc. Guarantor hereby waives notice of acceptance hereof and the non-performance by View-Master Ideal Group, Inc. of any of its covenants or obligations hereunder.

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* peaceful and quiet enjoyment of the Premises for the purposes and uses set forth in this Lease.

This Agreement shall inure to the benefit of the Landlord and its successors and assigns.

Guarantor hereby waives all defenses arising by reason of any disability or other defense of View-Master Ideal Group, Inc. or Guarantor, including all defenses, if any, arising from the filing of a petition in bankruptcy by or against View-Master Ideal Group, Inc. or by reason of the cessation of liability of View-Master Ideal Group, Inc. from any cause other than the full and complete performance of the terms of this Lease.

GUARANTOR:

TYCO TOYS, INC.,
a Delaware corporation

By /s/ [Illegible]
Its Executive Vice President

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that John G. Eyler is the person who appeared before me and said person acknowledged that [he] signed this instrument, on oath stated that [he] was authorized to execute the instrument and acknowledged it as the General Partner of CASCADE SQUARE ASSOCIATES, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: March 5, 1991

(Seal or stamp)

/s/ [Illegible]
Notary Public in and for the State
of Washington residing at [Illegible]
My appointment expires: 8/25/91

STATE OF NEW JERSEY)
) ss.
COUNTY OF BURLINGTON)

I certify that I know or have satisfactory evidence that Harry J. Pearce is the person who appeared before me and said person acknowledged that [he/she] signed this instrument, on oath stated that [he/she] was authorized to execute the instrument and acknowledged it as the Executive Vice President of TYCO TOYS, INC., to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: March 1, 1991.

(Seal or stamp)

/s/ Ivonne Dyson
Notary Public of New Jersey
My appointment expires: Dec. 7, 1992

STATE OF NEW JERSEY)
) ss.
COUNTY OF BURLINGTON)

I certify that I know or have satisfactory evidence that R. MICHAEL KENNEDY, JR. is the person who appeared before me and said person acknowledged that [he/she] signed this instrument, on oath stated that [he/she] was authorized to execute the instrument and acknowledged it as the Vice President of VIEW-MASTER IDEAL GROUP, INC., to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: March 1, 1991.

(Seal or stamp)

/s/ Ivonne Dyson
Notary Public of New Jersey
My appointment expires: Dec. 7, 1992

Parcel IA

A tract of land situated in the Northeast one-quarter of Section 27, Township 1 South. Range 1 West of the Willamette Meridian in the City of Beaverton, Washington County, Oregon, more particularly described follows:

COMMENCING at the East one-quarter corner of Section 27 said point being marked by a Washington County brass cap monument; thence North 01°51'43" East along the East line of Section 27, a distance of 327.94 feet; thence North 87°11'42" West, 60.01 feet to the true point of beginning of the tract herein to be described; thence North 87°11'42" West 274.55 feet; thence South 02°50'10" West 267.36 feet; thence North 06°56'53" West, a distance of 189.59 feet to a point on the East line of Southern Pacific Railroad right-of-way thence North 03°04'48" East along said East line 1096.66 feet; thence South 60°00'59" East, 180.46 feet; thence South 03°07'12" West, 352.05 feet; thence South 87°24'37" East, 267.67 feet; thence South 03°02'47" East, 306.49 feet; thence South 01°51'43" West, 91.76 feet to the point of beginning.

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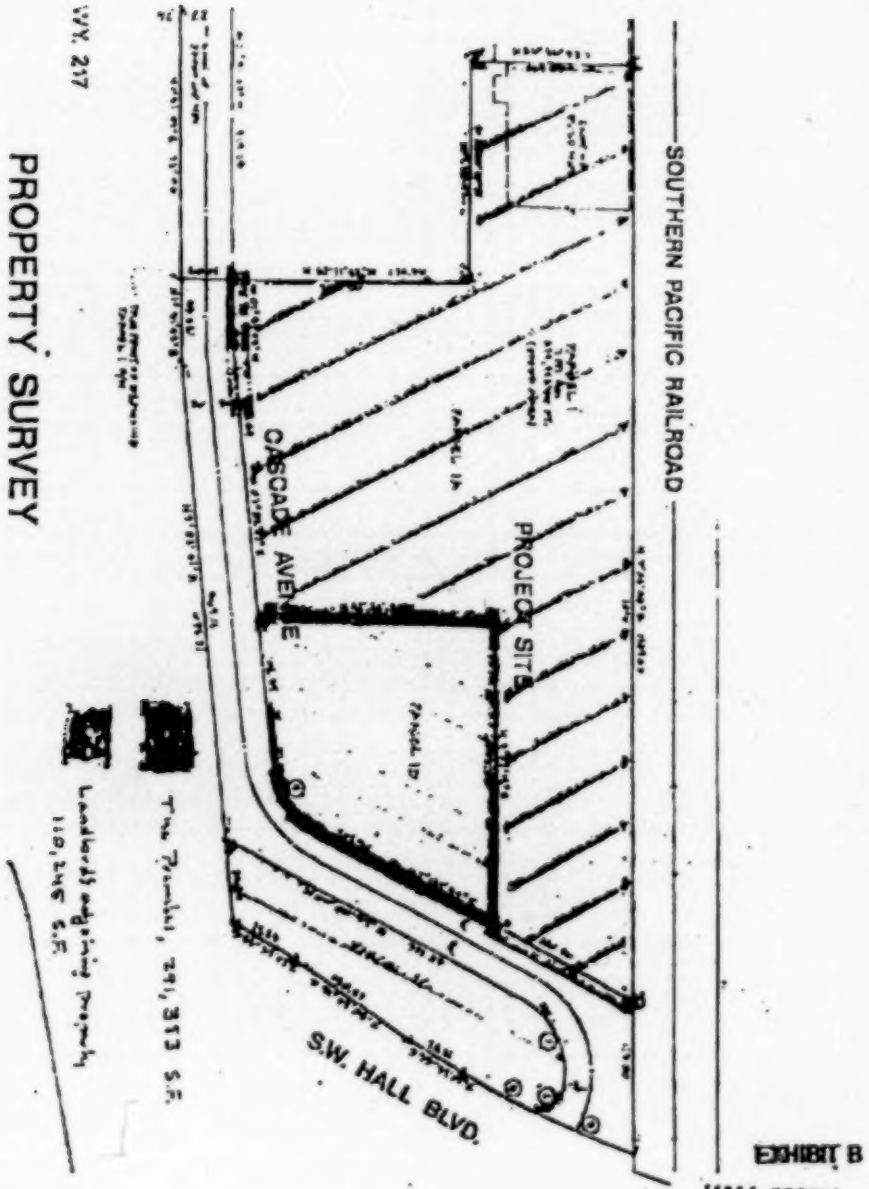


FR 227

LANDLORD'S FIXED ASSETS

Exhibit C Hall 00059

462 3 01677 Assembly Area Lighting
01712 Marley Aquatower
01743 Marley Aquatower #4421
01744 Marley Aquatower #4421
01750 Lighting-New Molding Area
01813 Marley Aquatower #4421
01814 200 Amp Service
01840 Marley Aquatower & Paco Unit PE Pump
01855 Cooling Tower
02267 Exhaust Blower
02455 Air Conditioner
02481 Reclaim Building
02623 Compressor-Ingersol Rand-60 HP
02624 Gas Service w/Pressure Regulator
02632 Feeder Lines To New Panels, 1, 2, 3, 4
02633 Transformer-1000 KVA w/Switchgear
02634 Ventilating Equip Systems 1-4
02635 Switch Gear-Elec.
02636 Connect Main Sanitary Sewer (Labor)
02637 Underground Electrical Service
02638 Electrical Distribution Sys Phase I
02639 Electrical Distrib. Sys. Phase II & III
02640 Install Bull Run Water
02644 G.E. Circuit Breaker; Watt Hour Meter
02645 500 KVA Transformer
02646 Switch Gear
02650 Transformer-Dry Type-100 KVA
02651 Indoor Air Circuit
02652 Building for Emergency Generator
02653 Auto Synchronizer-Elec.
02654 Auto Synchronizer-Elec.
02655 Motor Control Center Riser
02656 Crest Meter-3" S. R. Gal.

02657 Transformer-Westinghouse-3 Phase
02659 G.E. Transformer-Type D, 100 KVA
02660 Switch Gear-Metal Clad Indoor
02661 G.E. Dry Type Transformer
02663 G.E. Dry Type Transformer
02664 G.E. Dry Type Transformer
02665 G.E. Dry-Type Transformer
02666 G.E. Dry Type Transformer
02668 Control Center for Cafeteria Bldg.
02963 Solaconstant Voltage Transformer
03118 Switch Gear & Elec Panels Bldg 800
03130 Elec Switch Panel-277/480 Volt
03243 Lighting
462 3 03248 Aquatower-Morley Model 4421
03249 Signaling System
03314 2000 KVA Electric Power Substation
03334 Marley #14421 Aquatower
03335 Marley #4421 Aquatower
03372 Lighting
03426 30 KVA Transformer and Accessories
03547 Air Conditioner (30,000 BTU)
03630 Air Conditioner
03631 Air Conditioner
03632 Air Conditioners
03963 Burner Conversion
03974 Replace Bottom Section- #1 Boiler
03976 New Submersible G P Industrial Pump
04003 No 2 Boiler-Replace Bottom Section 1
04034 Emergency Lighting Systems w/Battery
04051 G.E. 1000 KVA Transformer
64052 Sorgel Stepdown Transformer 120-208
04053 Sargel Stepdown Transformer 120-208
04054 Sorgel Stepdown Transformer 120-208
04081 All Steam Heat Exchangers
04082 AOT Controls
04084 Air Collector Tanks

[Arbitration Trial Exhibit 103, filed in Docket No. 130, Hall Street Associates, L.L.C. v. Mattel, Inc. et al, United States District Court for the District of Oregon, Case No. 00-355-JO]

FIRST AMENDMENT TO LEASE
Between
CASCADE SQUARE ASSOCIATES
and
VIEW-MASTER IDEAL GROUP, INC.

This First Amendment to Lease (the "First-Amendment") dated this 29th day of April, 1996 amends that certain lease agreement dated March 5, 1991 between Cascade Square Associates, a Washington partnership ("Landlord"), and View-Master Ideal Group, Inc., an Oregon corporation f/k/a View-Master International Group, Inc. for certain real property and buildings and other improvements commonly known as 8585 Southwest Hall Boulevard, Beaverton, Oregon, as outlined on the drawing attached as Exhibit "A" (the "Premises").

WHEREAS, View-Master Ideal Group, Inc. has assigned its interest under the Lease to Tyco Manufacturing Corp., an Oregon corporation ("Tenant");

WHEREAS, the Lease has a lease expiration date of May 31, 1997; and

WHEREAS, the parties deem it in their mutual best interests to extend the term of the Lease through April 30, 2003.

NOW, THEREFORE, in Consideration of the above recitals, the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties, the parties do hereby agree to amend the Lease as follows:

1. **Paragraph 1.c. of the Lease shall be amended to read as follows:**

   "c. Lease Expiration Date. The Lease expiration is April 30, 2003."

2. **Paragraph 1.d. shall be amended and expanded to include the following:**

   Delete the fifth line which reads:

   "February 1, 1996 - May 31, 1997 $82,672.92"

   and insert the following:

   "February 1, 1996 - April 30, 2003 $82,672.92"

The following shall be added to paragraph 1.d.:

"CPI Escalations. The above monthly rental rate effective February 1, 1996 of $82,672.92 shall be increased on May 1, 1998 to take into account the increase in the CPI from May 1, 1997 through April 30, 1998. The monthly rent of $82,672.92 shall be multiplied by a fraction, the numerator of which is the CPI most recently published prior to May 1, 1998 and the denominator of which is the CPI most recently published prior to April 30, 1997. The resulting rent (the "Initial Increased Rent") shall be the monthly rent commencing May 1, 1998 through April 30, 1999.

On May 1, 1999 and on each successive May 1 for the remaining term of the Lease (each, the "Escalation Date") the Rent shall be increased annually to take into account the increase in the CPI from April 30 of the previous year to the Escalation Date. To accomplish this the Rent then being paid shall be multiplied by a fraction, the numerator of which is the CPI most recently published prior to the Escalation Date and the denominator of which is the CPI most recently published prior to May 1 of the previous year. The resulting amount

shall be the Rent to be paid through April 30 of the following year.

The "CPI" as utilized above shall be defined as the revised Consumer Price Index for All Urban Consumers All Items (Portland-Vancouver Area) (1982-84=100) as published by the United States Department of Labor. Should such index cease to be published, then the Landlord shall choose an index which, in the reasonable exercise of Landlord's discretion, is similar to the CPI, which index shall be substituted for the CPI.

In no event will any CPI adjustment result in a decrease in the monthly rental rate that is being paid at the time of said adjustment."

3. Section 10 of the Lease is hereby deleted in its entirety and replaced with the following:

"10. LANDLORD'S LIEN: Landlord agrees that any statutory or common law landlord's lien to which Landlord might otherwise be entitled shall not extend to Tenant's inventory located on the Premises, and Landlord and Tenant agree that Landlord shall grant to any party (the "Secured Party") reasonable access to the Premises to remove the same to the extent that such Secured Party certifies in writing to Landlord (i) that the Secured Party has a security interest in the inventory of Tenant and is entitled to do so pursuant to its agreement with Tenant; (ii) that the Secured Party does indemnify, defend and hold harmless the Landlord from any and all liability caused by or resulting from the actions of the Secured Party or the Secured Party's agents in exercising any rights with respect to the inventory and/or entering onto the Premises (other than due to the gross negligence or willful misconduct of the Landlord); and (iii) that the Secured Party and/or its agent shall not damage the Premises in any manner or fashion in exercising their

rights to remove the inventory and agrees to immediately reimburse the Landlord for the Landlord's reasonable estimated cost of repair for any damages to the Premises incurred as the result of their entry thereon. Landlord may rely on the certification without inquiry and shall have no liability to any party as a result of such reliance.

Access to any third party hereunder is to be without any charge or fee and for not more than four months from the earlier of (i) the date such party delivers such writing to Landlord or (ii) the date Landlord gives Tenant (and any party which has notified Landlord that it is a Secured Party) a written notice of default under this Lease, which default has not been cured. This Section 10 is for the benefit of all parties which have a security interest in inventory of Tenant and each such party is a third party beneficiary of this Section. Landlord acknowledges that General Electric Capital Corporation, as Agent, is a Secured Party for the purposes of such notice. No amendment, modification or supplement of this Section 10 shall be valid without the prior written consent of each secured party, whom Landlord is advised by Tenant has a security interest in Tenant's inventory."

4. New paragraph 34 shall be added is follows:

"34. COMPLETION OF CERTAIN OBLIGATIONS PRIOR TO TERMINATION. Any all obligations of Tenant under paragraph 8. Repair and Maintenance and paragraph 12 Hazardous Building Materials and Waste shall be performed and completed in their entirety to the satisfaction of Landlord not later than nine (9) months prior to the Least Expiration Date."

The Lease, other than as amended as set forth above, shall continue to be in full force and effect, and all of the terms and conditions in it shall remain effective and enforceable by and between the parties relative to the entire Premises.

Tyco Manufacturing Corp. is a wholly owned subsidiary of Tyco Toys, Inc., a Delaware corporation ("Guarantor"). Guarantor was the guarantor of View-Master Ideal Group, Inc.'s performance under the Lease. Guarantor by signing below hereby acknowledges that the amendment to this Lease is beneficial to it and hereby guarantees the performance of the Lease as amended.

LANDLORD:

CASCADE SQUARE ASSOCIATES,
a Washington partnership
By VIOLETT PROPERTIES, a Washington partnership, its General Partner

By /s/ Josef Diamond
Its Josef Diamond, Partner

TENANT:

TYCO MANUFACTURING CORP., an Oregon corporation

By /s/ R. Michael Kennedy, Jr.
Its Senior Vice President and Secretary

GUARANTOR:

TYCO TOYS, INC.,
a Delaware corporation

By /s/ Harry J. Pearce
Its Vice Chairman

Guaranty of Performance. The performance by Tyco Manufacturing Corp. of each and every covenant and obligation under the foregoing Lease and any assign-ments, additions, amendments, deletions of extensions thereof, is hereby guaranteed by Tyco Toys, Inc. and its successors and assigns (the "Guarantor"). Should Tyco Manufacturing Corp. reject this Lease and/or the performance thereof whether through its action or inaction in bankruptcy or otherwise, then Guarantor shall become the Tenant under the terms of the Lease and shall fulfill all of the duties of Tenant which have not then been fulfilled by Tyco Manufacturing Corp. The obligation of the Guarantor is a primary and unconditional obligation and shall be enforceable either before or after proceeding against Tyco Manufacturing Corp. Guarantor hereby waives notice of acceptance hereof and the non-performance by Tyco Manufacturing Corp. of any of its

covenants or obligations hereunder. This Agreement shall inure to the benefit of the Landlord and its successors and assigns.

Guarantor hereby waives all defenses arising by reason of any disability or other defense of View-Master Ideal Group, Inc. or Guarantor, including all defenses, if any, arising from the filing of a petition in bankruptcy by or against Tyco Manufacturing Corp. or by reason of the cessation of liability of View-Master Ideal Group, Inc. from any cause other than the full and complete performance of the terms of this Lease.

GUARANTOR:

TYCO TOYS, INC., a
Delaware corporation

By /s/ Harry J. Pearce
Its Vice Chairman

STATE OF WASHINGTON)
) ss:
COUNTY OF KING)

I certify that I know or have satisfactory evidence that Josef Diamond is the person who appeared before me and said person acknowledged that [he/she] signed this instrument, on oath stated that [he/she] was authorized to execute the instrument and acknowledged it as the [Illegible] of CASCADE SQUARE ASSOCIATES, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: May 6, 1996.

[Seal or stamp]

/s/ Judy Ann Mounton
JUDY ANN MOULTON
Notary Public in and for the State of
Washington residing at Seattle, WA.
My appointment expires: 1/5/99

STATE OF NEW JERSEY)
) ss:
COUNTY OF BURLINGTON)

I certify that I know or have satisfactory evidence that Harry J. Pearce is the person who appeared before me and said person acknowledged that [he/she] signed this instrument, on oath stated that [he/she] was authorized to execute the instrument and acknowledged it as the Vice Chairman of TYCO TOYS, INC., to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: April 29, 1996

[Seal or stamp]

/s/ Therese C. Cronin
THERESE C. CRONIN
Notary Public in and for the State of New Jersey residing at Oaklyn, NJ
My appointment expires: 9/26/98

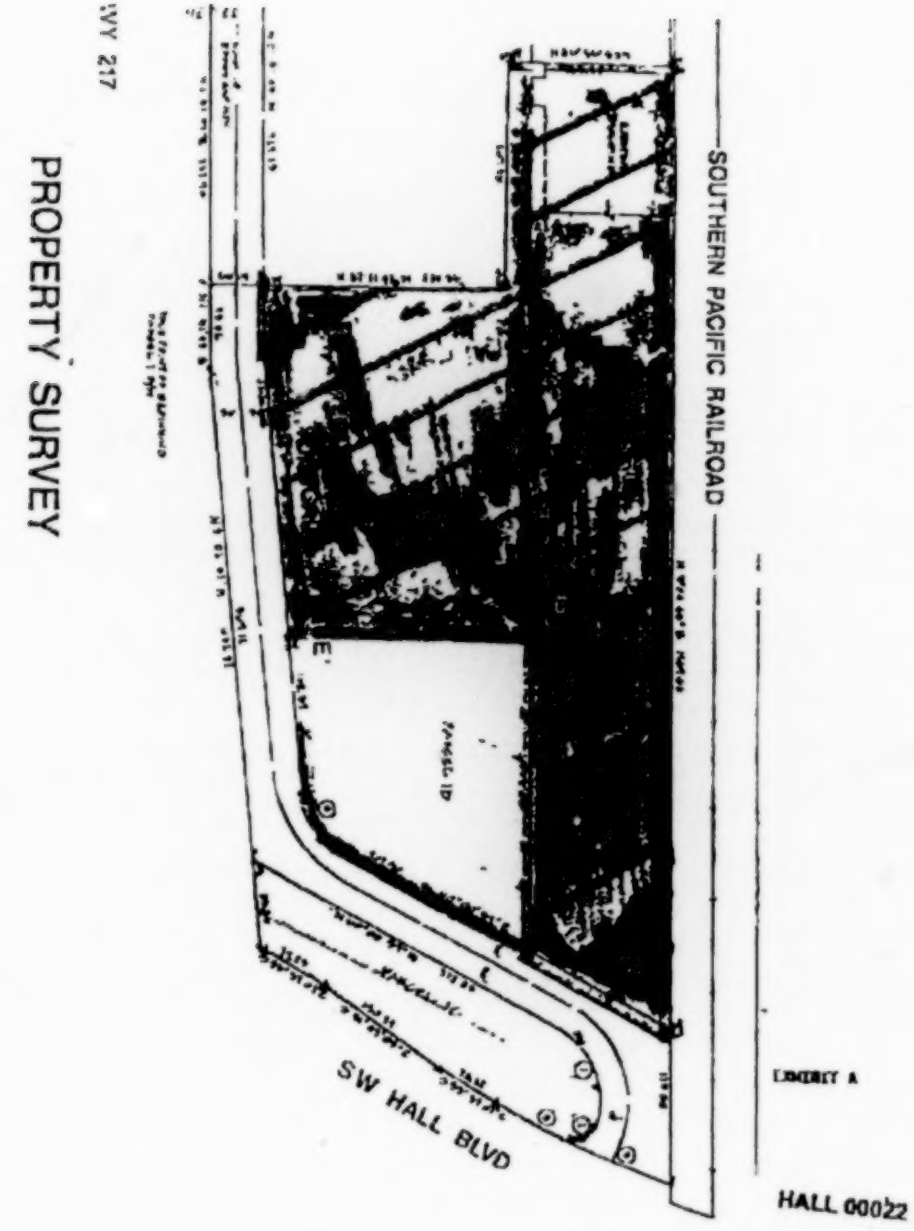
STATE OF NEW JERSEY)
) ss:
COUNTY OF BURLINGTON)

I certify that I know or have satisfactory evidence that R. Michael Kennedy, Jr. is the person who appeared before me and said person acknowledged that [he/she] signed this instrument, on oath stated that [he/she] was authorized to execute the instrument and acknowledged it as the Sr. Vice President and Sect. of TYCO TOYS, INC., to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: April 29, 1996.

[Seal or stamp]

/s/ Therese C. Cronin
THERESE C. CRONIN
Notary Public in and for the State of New Jersey residing at Oaklyn, NJ
My appointment expires: 9/26/98



PROPERTY SURVEY

HWY 217

EXHIBIT A

HALL 00022

ER 236

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

DEPOSITION OF ROBERT HIBBS
Taken in behalf of the Defendants
January 31, 2001

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[20] was made for all documents relative to this lease.

Q. Expanding the time period, then, to any time you had discussions with Mr. Diamond about the 1991 lease and the 1997 lease amendment.

A. Yes.

Q. And can you tell me what was said?

MR. FINN: That—I'm instructing the witness not to answer that question because Mr. Hibbs was acting as attorney for Hall Street and Cascade Square Associates, and those conversations are privileged.

(INSTRUCTION-BY-COUNSEL)

MR. HSIAO: And since Mr. Hibbs was a principal of Hall Street and at times acting as counsel, Mattel finds that the

assertion of privilege is improper and wishes to object to both its assertion and the proffering of Mr. Hibbs's testimony in light of that objection, and will rely upon this objection on the record to preserve all of its rights and remedies pursuant to this objection.

With that, let's go ahead and continue.

* * * *

[54] A. I know that I've read it after he signed it.

Q. Do you know if you read it before he signed it?

A. Undoubtedly did, yes.

Q. How many times?

A. I don't know.

Q. But you believe you did at least once--

A: Yes.

Q. —all the way through—

A. Yes.

Q. —before he signed it?

Did you understand each of the terms in this lease before Mr. Eyler signed it?

A. Yes.

Q. And do you recall communicating to him anything about that?

MR. FINN: That's—I'm sorry. That's privileged. I'll instruct the witness not to answer.

(INSTRUCTION-BY-COUNSEL)

MR. HSIAO: And just so I understand any question that I ask this witness about his communications regarding this lease to Mr. Eyler; [55] or to Mr. Diamond, you will instruct the witness not to answer based upon the attorney-client, work-product privilege; is that correct?

MR. FINN: Correct.

BY MR. HSIAO: (Continuing)

Q. And just so I have this on the record, you refuse to answer, based on your counsel's advice, correct?

A. That is correct.

Q. That would be true each time your counsel asserts the privilege objection, that you will not answer, based on your counsel's advice?

A. That is correct.

MR. HSIAO: All right.

(Discussion off the record.)

MR. HSIAO: I assume it works in reverse; it's any communication regardless of who initiates it. So any communication from Mr. Diamond or Mr. Eyler to Mr. Hibbs, you will also instruct your client not to answer?

MR. FINN: That's right.

BY MR. HSIAO: (Continuing)

Q. Let's look, then, at page 26, Paragraph 33d.

* * * *

[58] Tenant."

Q. So for that sentence, would your testimony be the same; you don't recall whether you drafted this or not?

A. That is correct.

Q. And you don't recall whether you reviewed this section or not prior to the entry of the lease—

A. Correct.

Q. —between Mr. Eyler—

A. That is correct.

Q. Did you provide advice to Mr. Eyler regarding this section?

MR. FINN: That's privileged.

(INSTRUCTION-BY-COUNSEL)

BY MR. HSIAO: (Continuing)

Q. Did you have any discussions with Mr. Eyler regarding this section?

MR. FINN: That's privileged

(INSTRUCTION-BY-COUNSEL)

BY MR. HSIAO: (Continuing)

Q. And so based upon your counsel's instruction, are you refusing to answer my questions?

A. Those questions.

[59] Q. Yes. Thank you.

The answer is yes, you're refusing to answer the question?

A. Those questions.

Q. Yes. Thank you.

Do you recall what your understanding was of these sentences prior to Mr. Eyler signing the lease agreement?

A. No, I do not.

Q. And today, can you tell me what this sentence means to you?

A. It means that the lease may be modified only by writing—by a written document signed by both parties.

Q. Is it fair to say that by signing this lease, Mr. Eyler agreed that the terms of the lease would apply, as you've just stated, both to the landlord and the tenant?

MR. FINN: I'm sorry. Read that back, please.

(Reporter read as follows:

"Question: Is it fair to say that by signing this lease, Mr. Eyler agreed that the terms of the lease would apply, as

* * * *

[91] A. Correct.

Q. What did you tell them about Section 3?

A. I don't recall.

Q. What did they tell you about Section 3?

A. I don't recall.

Q. So in 1991 you don't recall what you told them or what they told you about Section 3?

A. That is correct.

Q. And that would be for all of Section 3?

A. Yes.

Q. Other than what you've testified to, is there any other discussion that you remember about Section 3, in 1991, prior to the signing of the lease?

MR. FINN: Sorry?

THE WITNESS: I've discussed it with my clients, also. That's where I'm going.

MR. FINN: Okay. Thanks.

BY MR. HSIAO: (Continuing)

Q. What did you say to your clients about Section 3?

[92] MR. FINN: That's privileged.

MR. HSIAO: Please, for the witness—instruct your witness.

MR. FINN: I thought we already set up a rule that we didn't have to keep doing this every time.

MR. HSIAO: All right. So—I'm sorry. I—in fact, we did. You have a blanket instruction to your client not to reveal conversations he had with other members of Cascade Square about the '91 lease and the '96 lease.

MR. FINN: That's correct.

MR. HSIAO: And for each of those questions, you will instruct your witness not to answer?

MR. FINN: Right.

BY MR. HSIAO: (Continuing)

Q. Other than conversations that you had with your clients and what you've testified to previously in the deposition, did you have any other communications in 1991, before the lease was signed, about Paragraph 3?

A. Not that I recall.

(Discussion off the record.)

[93] BY MR. HSIAO: (Continuing)

Q. Other than the principals of Cascade, did Cascade have any other employees?

A. No.

Q. Did they have any other members, associates, or participants?

A. I take that back. We did have an employee.

Q. Who was that?

A. Dan Mundel (ph).

Q. What was his function?

A. He was the manager of the Cascade Square office building.

MR. HSIAO: And, Jim, I assume any communications that the deponent would have had with this employee, you will similarly instruct him not to answer.

MR. FINN: That's correct.

MR. HSIAO: Again, based on the attorney-client privilege?

MR. FINN: Right.

BY MR.HSIAO: (Continuing)

Q. All right. So again, just trying make sure I've covered the universe of—

MR. FINN: Hang on one second.

* * * *

[98] was, was also that of Cascade Square's, correct?

A. That is correct, in this instance.

Q. And that would be true even if Mr. Eyler and Mr. Diamond did not have that understanding?

A. The only way that I would obtain their understanding is through discussions with my clients, which are subject to the privilege.

Q. And which you will not discuss, correct?

A. I'm instructed not to discuss, yes.

Q. And the questions of which you will refuse to answer, correct?

A. On instruction from counsel, yes.

Q. All right. Then the last paragraph which—the last sentence which is there appears to be in a—

(Discussion off the record.)

MR. HSIAO: I'm sorry. I think we have a standing instruction in place. Mr. Finn has given a standing instruction to Mr. Hibbs that any question that involves communication between the—any member of Cascade or Hall Street and Mr. Hibbs is privileged and will not [99] be disclosed.

(Discussion off the record.)

MR. HSIAO: Oh, I'm sorry. That's a fair question.

BY MR. HSIAO: (Continuing)

Q. How—how has Cascade communicated to Mr. Finn that the privilege should be asserted in this way?

MR. FINN: I don't understand.

MR. HSIAO: Are you asserting the privilege on your own, or are you asserting it on instruction from Cascade or for—

MR. FINN: What difference does it make? I never thought about that issue, so I don't know how to answer it, nor do I think I'm required to.

BY MR. HSIAO: (Continuing)

Q. Okay Back to the document. The last sentence appears to be—

MR. BLACKMAN: Hold on, though. Mr. Hibbs is here as a principal of Hall Street, not as its counsel.

MR. HSIAO: Well, let's clarify.

BY MR. HSIAO: (Continuing)

Q. Are you testifying as a principal of [100] Hall Street and not as its counsel?

A. No.

MR. FINN: I don't know how he can bifurcate himself. He is what he is. And it doesn't make any difference, for purposes of whether or not questions are privileged, in my view.

MR. HSIAO: So –but he is testifying today as a principal of Hall Street or as its counsel or both?

MR. FINN: I don't—I don't know the answer to that question. I don't really know what difference it makes. I don't know what point you're trying to make.

When I said he is what he is, he acted as lawyer and he was a principal, so—and some of his answers will necessarily be related to the work he did as a lawyer, some of which are privileged and some of which aren't, which he's already talked about. So he's doing it from both points of view, I think.

MR. BLACKMAN: Counsel, let me say, based on what we've heard so far today and without the documents we'll be requesting, it's my understanding that Mr. Hibbs is the managing

* * * *

[136] this section would change that you just testified to, was that your understanding as the lawyer for Cascade Square or was it your understanding as the principal of Cascade Square?

A. Both.

(Discussion off the record.)

BY MR. HSIAO: (Continuing)

Q. As the principal of Cascade Square, did you communicate that understanding to any of your partners?

MR. FINN: Objection; subject to the instruction.

(INSTRUCTION-BY-COUNSEL)

MR. HSIAO: I'm sorry. For my record, please instruct your witness not to answer based on the privilege.

MR. FINN: That's the instruction.

BY MR. HSIAO: (Continuing)

Q. And do you refuse to answer the question based on the instruction?

A. I do.

MR. FINN: Let me explain, so the record is clear. I don't think it's possible for this witness to distinguish between [137] conversations he had as an attorney about the first amendment and conversations he had as a principal about the first amendment.

If that's not true, if you have an ability to segregate those two things, then say so, but I'm assuming that you can't do that.

THE WITNESS: That is correct.

MR. BLACKMAN: And, Counsel, I think, so the record is clear, I will stick my two cents in here and say that I believe if he can't distinguish, there is no privilege; not the reverse.

BY MR. HSIAO: (Continuing)

Q. Did you communicate your understanding, regardless of whether you did it internally, did you communicate that understanding external to anyone at View-Master, your interpretation of Section 3?

A. I conveyed to View-Master and View-Master conveyed to me the understanding of the parties; that the term of the lease, the time during which the tenant would pay rent and would and perform those other obligations, would extend through—without the ability to terminate earlier, would. extend through the

* * * *

CASE NAME: Hall Street vs. Mattel, et al.
DEPONENT: Robert Hibbs

PAGE	LINE	REASON	CORRECTION

I hereby certify that I have read the deposition taken January 31, 2001, and that this deposition, together with any corrections or additions, is a true and accurate record of my testimony:

/s/ [Illegible]
Witness' signature

Subscribed and sworn to before me this 6th day of March, 2001.

Notary Public for the State of Washington
My commission expires: 3-27-01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

DEPOSITION OF JOHN EYLER
Taken in behalf of the Defendants
January 31, 2001

[49] very much involved in negotiations at various times, but I can't say specifically this 1991 lease.

Q. Thank you.

And on your side, was Joe Diamond involved in the negotiation of the 1991 lease?

A. Sure that he read it. At least he—he would make his input to Bob, like I did.

Q. Do you recall any communications that you had regarding the negotiation of this 1991 lease marked as Defendants' Exhibit No. 2?

A. I'm not sure I understood that question.

Q. Sure. Do you remember talking with anyone about the 1991 lease before you signed it?

A. Well, I would have talked to Bob Hibbs about it before I signed it.

Q. Do you recall anything about what you said?

MR. FINN: Well, wait a minute. That would be privileged, and so I'm instructing the witness not to answer, regarding his conversation with Mr. Hibbs.

(INSTRUCTION-BY-COUNSEL)

[50] MR. HSIAO: And just so I understand what the deponent can and cannot testify to, the discussions that he had with Bob Hibbs as partners of Cascade Square Associates are privileged?

MR. FINN: Well, the way I put it is the discussions that Mr. Eyler had with Bob Hibbs are privileged because Mr. Hibbs was acting as the attorney for Cascade Square Associates in regard to the negotiation of leases and that sort of thing.

MR. HSIAO: Okay. I understand.

(Discussion off the record.)

BY MR. HSIAO: (Continuing)

Q. Just to clarify, in the time of the negotiation of the 1991 list—lease, Bob Hibbs was your partner at Cascade Square Associates, correct?

A. Yes.

Q. And he was also providing you with legal advice about the 1991 lease, correct?

A. Yes.

Q. And so the—

MR. HSIAO: Again, it you'll assert the privilege for me, just so I have it clear—[51] the communication between Mr. Eyler and Mr. Hibbs about the negotiation of the 1991 lease, you're going to assert the privilege and instruct the witness not to answer?

MR. FINN: Correct.

(Discussion off the record.)

BY MR. HSIAO: (Continuing)

Q. And Mr. Diamond was your partner at that time, as well?

A. Yes.

Q. Was Mr. Diamond providing you with legal advice regarding the negotiation of the 1991 lease?

A. Providing me?

Q. Correct.

A. I didn't have many conversations with him at all, so—as I said, his input on legal would go to Bob.

Q. Do you recall any conversations that you had with Joe Diamond regarding the 1991 lease?

A. I can't remember any right now.

Q. And other than conversations, are there documents or other communication—written communications that you would have

* * * *

CASE NAME: Hall Street vs. Mattel, et al.
DEPONENT: John Eyler

PAGE	LINE	REASON	REASON
4	23	Wrong Number	(425) 861-9026
29	11	Error In Transcription	. . . For My "Employer."
31	23	Error In Transcription	. . . If "You Hadn't" . . .

I hereby certify that I have read the deposition taken January 31, 2001, and that this deposition, together with any corrections or additions, is a true and accurate record of my testimony:

/s/ [Illegible]
Witness' signature

Subscribed and sworn to before me this 12th day of March, 2001.

Notary Public for the State of Washington
My commission expires: 7-19-04

[Arbitration Trial Exhibit 164, filed in Docket No. 130, Hall Street Associates, L.L.C. v. Mattel, Inc. et al, United States District Court for the District of Oregon, Case No. 00-355-JO]

[LOGO]

INTERNAL COMMUNICATIONS Date: February 8, 1991

To: ARNOLD THALER; HARRY PEARCE

From: MICHAEL KENNEDY

Subject: EYLER LEASE - BEAVERTON

We had several exchanges with Landlord's counsel on Thursday, resulting in some progress which I have summarized below.

1. "Predecessors-in-Interest" language.

   While not adopting our proposed language changes, he suggested new language effectively limiting our liability to damages actually caused by the conduct of VMIG.

   The result is that no damages for PCB's asbestos, hazardous waste or "other damage" caused exclusively by predecessors-in-interest would be our responsibility.

2. "Burden of Defense" language.

   In the case of responsibility shared by various parties, our share will be "a fair and reasonable allocation" of defense costs based on our actual contribution to damages.

   The allocation will be attempted first by agreement, second by arbitration, and third (if necessary) by judicial determination; it is intended to be accomplished within two (2) months if not agreed to.

The above represents, in our view, a reasonable disposition of the two points which have held up signing of the renewal Lease Agreement.

(Note: If Landlord decides to demolish the building, our responsibility will be limited to what it would have been if the building had remained in use.)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed NOV 16, 2004]

No. 03-35525
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff- Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

No. 03-35526
D.C. No. CV-00-00355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellant,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellee,

and,

TYCO INDUSTRIES, INC, a Delaware corporation; et al.,
Defendants.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted November 3, 2004
Portland, Oregon

MEMORANDUM*

Before: TROTT and KLEINFELD, Circuit Judges, and POLLAK,** District Judge.

Our en banc decision in Kyocera Corp. v. Prudential-Bache Trade Services., Inc.[1] controls this case. Under *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.[2] The evidence that the parties intended that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed is not strong enough to distinguish this case from Kyocera.

Kyocera compels us to vacate the district court's judgment based on the arbitration agreement and remand to the district court.[3] On remand the district court shall return to the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

[2] *Kyocera*, 341 F.3d at 1000-02.

[3] *Id.* at 994 ("The Federal Arbitration. Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard. Because the

application to confirm the original arbitration award (not the subsequent award revised after reversal), and shall confirm that award, unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.[4]

Because we vacate the judgment based on the arbitration agreement we need not reach the attorneys' fees issue.

We affirm the district court's separate finding that Mattel was within its rights in terminating the lease. Although the lease termination provision suggests a possible scrivener's error when the lease was amended, no mistake is claimed nor reformation sought, and the parol evidence rule requires that this integrated agreement be enforced as written without consideration of extrinsic evidence.[5]

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts.").

[4] Id. at 997-98.

[5] See Indus. Indem. Co. v. Aetna Cas. & Sur. Co., 465 F.2d 934, 937 (9th Cir. 1972).

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. CV 00-355-JO

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited Liability Company,
Plaintiff,

v.

MATTEL, INC., a Delaware corporation; TYCO INDUSTRIES, INC., a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; and VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

DECLARATION OF PETER HSIAO AND EXHIBITS SUBMITTED IN OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER AND JUDGMENT AWARDING SUPPLEMENTAL ATTORNEYS' FEES, COSTS, AND EXPENSES

I, Peter Hsiao, declare and state as follows:

1. I am a partner at Morrison & Foerster LLP, and am one of the attorneys primarily responsible for representing defendant Mattel, Inc. ("Mattel") in the action captioned *Hall Street Associates, L.L.C. v. Mattel, Inc., et al.* As Mattel's attorney, I am familiar with the pleadings and documents in this case. I have personal knowledge of the matters set forth in this declaration, and, if called upon, could competently testify thereto.

2. Exhibit A attached hereto is a true and correct copy of excerpts from the transcript of trial proceedings before the Honorable Robert E. Jones, United States District Court Judge, on April 27, 2001, in the action captioned *Hall Street Associates, L.L.C. v. Mattel, Inc., et al.*

3. Exhibit B attached hereto is an original certified copy of the Statutory Special Warranty Deed, dated September 27, 2004, transferring property in Beaverton, Oregon from Hall Street Associates, LLC, to NSHE Cascade, LLC. Mattel requests that the Court take judicial notice of this document pursuant to Federal Rules of Evidence 201 and 902.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on July 22, 2005, in Los Angeles, California.

/s/ Peter Hsiao
PETER HSIAO

AFTER RECORDING RETURN TO:	UNTIL A CHANGE IS REQUESTED, ALL TAX STATEMENTS SHALL BE SENT TO:
After Recording Return To: Ticor Title Insurance 1000 SW Broadway, Ste 1555 Portland OR 97205	Harsch Investment Properties, LLC 1121 S.W. Salmon Street, Sixth Floor Portland, OR 97205 Attention: Tax Department

STATUTORY SPECIAL WARRANTY DEED

HALL STREET ASSOCIATES, LLC, a Washington limited liability company, Grantor, conveys and specially warrants to NSHE CASCADE, LLC, an Oregon limited liability company, Grantee, the following described real property (the "Property") free of encumbrances created or suffered by Grantor except as specifically set forth herein:

See Exhibit "A" attached hereto which is incorporated herein by this reference.

The true consideration for this conveyance is Five Million Four Hundred Thousand and No/100 Dollars ($5,400,000.00). The consideration is paid by an accommodation party pursuant to an exchange of properties under Section 1031 of the Internal Revenue Code.

The Property is free of encumbrances created or suffered by Grantor except as specifically set forth on Exhibit "B" attached hereto.

The Property shall be further subject to the following restrictions:

1. The former water supply well located on the Property needs to be retained in the event future testing is necessary as part of a possible health study for former plant workers;

2. Future changes to the Property that would interfere with the operation and/or maintenance of the groundwater remediation system located at the Property will require notification to the Oregon Department of Environmental Quality (the "DEQ") by the owner of the Property and DEQ approval of any physical changes to the remediation equipment installed at the Property; and

3. The owner of the Property should consult with DEQ concerning the consolidation of contaminated soils beneath building(s) or paved parking areas to ensure such activities will not exacerbate existing conditions at the Property.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

Dated this 27th day of September, 2004,

Grantor: **HALL STREET ASSOCIATES, LLC,**
a Washington limited liability company

By: **JOSEF DIAMOND INVESTMENTS LLC,**
a Washington limited liability company
Its: Managing Member

By: /s/: Josef Diamond, Manager

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that JOSEF DIAMOND is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Manager of JOSEF DIAMOND INVESTMENTS, LLC, a Washington limited liability company, the Managing Member of HALL STREET ASSOCIATES, LLC, a Washington limited liability company, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: 9/27/04

/s/: Darby L. Savery
Notary Public in and for the State of Washington,
Residing at Covington.
My appointment expires: 11/15/07

EXHIBIT A
TO DEED

(Real Property Description)

A tract of land situated in the Northeast one-quarter of Section 27, Township I South; Range 1 West of the Willamette Meridian, in the City of Beaverton, County of Washington and State of Oregon, more particularly described as follows:

Commencing at the East one-quarter corner of Section 27, said point being marked by a Washington County brass cap monument; thence North 01° 51' 43" East along the East line of Section 27, a distance of 327.94 feet; thence North 87° 00'42" West 60.01 feet to the true point of beginning of the tract herein to be described; thence North 87° 11' 42" West 274.55 feet; thence South 02° 50'10" West 267.36 feet; thence North 86° 56' 53" West a distance of 189.59 feet to a point on the East line of Southern Pacific Railroad right-of-way; thence North 03° 04' 48" East along said East line, 1096.66 feet; thence South 60° 00' 59" East 180.46 feet; thence South 03° 07' 12" West 352.05 feet; thence South 87° 24' 37" East 267.67 feet; thence South 03° 02' 47" East 306.49 feet; thence South 01° 51' 43" West 91.76 feet to the point of beginning.

TOGETHER WITH an easement for vehicular and pedestrian ingress and egress and for utility installation, set forth in that certain Reciprocal Easement Agreement recorded March 6, 1996 as Fee No. 96019861, more particularly described as follows:

EASEMENT NO. 1: Beginning at the Easterly one-quarter corner of said Section 27, said point being on the Easterly boundary line of said Burlington Cascade Plaza property; thence South 00° 00' 00" West along said section line and the Easterly boundary line of said Burlington Cascade Plaza property a distance of 445.00 feet to an angle point in said

boundary line; thence South 40° 30' 49" West along said boundary line a distance of 92.36 feet to a point that is 60.00 feet Westerly of when measured at right angles to the Easterly line of said Section 27; thence North 00° 00' 00" East; parallel with and 60.00 feet Westerly of said Easterly section line a distance of 515.53 feet; thence North 00° 36' 33" East parallel with and 60.00 feet Westerly of said Easterly section line a distance of 329.28 feet to a point on the Northerly boundary line of said Burlington Cascade Plaza property; thence South 88° 27' 10" East along said Northerly boundary line a distance of 60.01 feet to a point on the Easterly line of said Section 27; thence South 00° 36' 33" West along said Easterly boundary line a distance of 327.98 feet to the true point of beginning.

EASEMENT NO. 2: Beginning at the Northeasterly corner of said Burlington Cascade Plaza property, said point being North 00° 36' 33" East along the Easterly line of said Section 27, a distance of 327.98 feet from the East one-quarter corner of said Section 27; thence North 88° 27' 10' West along the Northerly line of said Burlington Cascade Plaza property a distance of 60.01 feet to a point that is 60.00 feet Westerly of when measured at right angles to the Easterly line of said Section 27, said point being the true point of beginning of the easement herein described; thence South 00° 36' 33" West parallel with and 60.00 feet Westerly of the Easterly line of said Section 27, a distance of 10.00 feet to a point that is 10.00 feet Southerly of when measured at right angles to the Northerly line of said Burlington Cascade Plaza property; thence North 88° 27' 10" West parallel with and 10.00 feet Southerly of said Northerly boundary line a distance of 267.69 feet to a point that is 7.00 feet Easterly of when measured at right angles to a North South line in said boundary line; thence South 01° 34' 22" West parallel with and 7.00 feet Easterly of said boundary line a distance of 257.26 feet; thence North 88° 25' 38" West a distance of 7.00 feet to an angle point in said Burlington Cascade Plaza

boundary line; thence North 01° 34' 22" East along said boundary line a distance of 267.26 feet to an angle point in said boundary line; thence South 88° 27' 10" East along said boundary line a distance of 274.52 feet to the true point of beginning.

ALSO TOGETHER WITH reciprocal easement rights contained in a Joint Declaration recorded September 1, 1983 as Document No. 83-032264, and re-recorded December 14, 1983 as Document No. 83-046081, and amended by Document recorded March 4, 1993 as Document No. 93-016612, and amended by Document recorded September 6, 1995 as Document No. 95-062984 and also recorded in Document recorded September 12, 1995 as Document No. 95-064672.

AND ALSO TOGETHER. WITH rights contained in a Party Wall Agreement recorded October 6, 1983 as Document No. 83-037028 and recorded December 29, 1983 as Document No. 83-048042.

AND ALSO TOGETHER WITH rights contained in a Real Estate License Agreement recorded March 4, 1993 as Document No. 93-016601.

EXHIBIT B TO DEED

(Permitted Exceptions)

1. The lien of non-delinquent general real estate taxes and assessments, if any, not yet due and payable.

2. Joint Declaration of Reciprocal Easements and Restrictions, including the terms and provisions thereof,

By:	Western International Properties, a joint venture composed of I.L.C., Inc., a Washington corporation and James B. Neuman and L.P.A.W.C., a joint venture composed of Fisher-Downs Partnership and Venture Financial Enterprises, Inc.
Dated:	August 31, 1983
Recorded Date:	September 1, 1983
Recording Number:	83032264,
Re-recorded Date:	December 14, 1983
Recording Number:	83046081
Amended by Document	
Recorded Date:	March 4, 1993
Recording Number:	93016612
Amended by Document	
Recorded Date:	September 6, 1995
Recording Number:	95062984
And also recorded in Document	
Recorded Date:	September 12, 1995
Recording Number:	95064672

3. Party Wall Agreement, including the terms and provisions thereof,

Between:	Western International Properties, a joint venture composed of I.L.C., Inc., a Washington corporation and James B. Neuman

And:	L.P.A.W.C., a joint venture composed of Fisher-Downs Partnership and Venture Financial Enterprises, Inc.
Recorded Date:	October 6, 1983
Recording Number:	83037028 and
Recorded Date:	December 29, 1983
Recording Number:	83048042

4. Easement, including the terms and provisions thereof,

From:	Cascade Square Associates
To:	General Telephone Company of the Northwest, Inc.; a corporation
Recorded Date:	March 21, 1985
Recording Number:	85009853
For:	Communications lines
Affects:	Exact location cannot be determined

5. Easement, including the terms and provisions thereof,

From:	Cascade Square Associates
To:	City of Beaverton, a municipal corporation
Recorded Date:	August 2, 1985
Recording Number:	85029658

6. Real Estate License Agreement, including the terms and provisions thereof,

Between:	Pacific First Bank, a federal savings bank
And:	Cascade Square Associates, a Washington general partnership
Dated:	March 4, 1993
Recorded Date:	March 4, 1993
Recording Number:	93016611
Affects:	Allows for improvements on the herein described parcel to encroach onto an adjacent parcel

7. Easement, including the terms and provisions thereof,

From:	Ads Investment Limited Partnership, an Oregon limited partnership fka Burlington Cascade Plaza Limited Partnership
To:	Cascade Square Associates aka Cascade Square Association, a Washington general partnership
Recorded Date:	March 6, 1996
Recording Number:	96019861

8. Stipulation and Consent Decrees as contained in Washington County Circuit Court Case No. C030225CV, entitled State of Oregon, by and through its Department of Environmental Quality, Plaintiff and Hall Street Associates, L.L.C., et al, Respondents, including the terms and provisions thereof,

Recorded Date:	March 11, 2003
Recording Number:	2003035835 and
Recorded Date:	March 11, 2003
Recording Number:	2003036059 and
Recorded Date:	March 20, 2003
Recording Number:	2003042090 and
Recorded Date:	April 18, 2003
Recording Number:	2003060678

9. Matters disclosed on the ALTA/ACSM Land Survey prepared by kpff Consulting Engineers dated April 9, 2004, Job No. 303182, as follows:
   a) The existing building shown as having 143,501 square feet extends beyond the 10 foot building setback line in two areas:
      1) along the most Northerly East property line
      2) along the Southerly property line.

b) The existing building shown as having 21,530 square feet extends beyond the 10 foot building setback line along the most Easterly North property line.

c) The following items extend beyond the West property line:

1) Four roll up doors with loading docks; two of which are shown to include steel ladders
2) Three air vents
3) A two inch air pipe
4) A one inch pipe at the SW corner of the property
5) Four rain drains
6) A Corrugated metal shed
7) A six inch storm water drain line outfall.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed AUG 1, 2006]

No. 05-35721
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

No. 05-35906
D.C. No. CV-00-00355-REJ

HALL STREET ASSOCIATES, L.L.C.,
a Washington Limited liability company,
Plaintiff - Appellee,

v.

MATTEL INC., a Delaware corporation,
Defendant - Appellant,

and

TYCO INDUSTRIES, INC, a Delaware corporation; TYCO MANUFACTURING CORP., an Oregon corporation; TYCO TOYS, INC., a Delaware corporation; VIEW-MASTER IDEAL GROUP, INC., an Oregon corporation,
Defendants.

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted July 25, 2006
Portland, Oregon

MEMORANDUM*

Before: GOODWIN, REINHARDT, and GRABER, Circuit Judges.

This appeal of the district court's refusal to enforce an arbitration award is before us for the second time. *See Hall St. Assoc., LLC v. Mattel, Inc.*, 113 Fed. Appx. 272 (9th Cir. 2004). Initially, we reversed the district court for using an improper standard of review and provided instructions to enforce the arbitration award unless grounds for not doing so existed under either 9 U.S.C. §§ 10 or 11. *Id.* at 272. On remand, the district court again failed to enforce the arbitration award, this time because it was "implausible." Implausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. §§ 10 or 11.

Although the arbitrator's assessment of the merits in this case contains possible errors of law, those errors are not a sufficient basis for a federal court to overrule an arbitration award. *See Employers Ins. of Wausau v. Nat'l Union Fire Ins.*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Co. of Pittsburgh, 933 F.2d 1481, 1486 (9th Cir. 1991) ("We may not predicate reversal on . . . erroneous findings of fact or conclusions of law."); *see also Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001) ("Our task is, in essence, to review the procedural soundness of the arbitral decision, not its substantive merit."). Furthermore, it cannot be said that the arbitrator's decision in this case is "completely irrational." *See Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (construing 9 U.S.C. § 10(a)(4), the only subsection of either 9 U.S.C. §§ 10 or 11 that could conceivably apply to the arbitration award in this case). Thus, we remand the case to the district court with instructions to enforce the original arbitration award and declare Mattel the prevailing party. The district court's award of attorneys' fees in favor of Hall Street is also reversed and the district court should determine the attorneys' fees and costs due to Mattel under the arbitration agreement.

REVERSED AND REMANDED

Hall Street Associates, L.L.C. v. Mattel, Inc., Nos. 05-35721, 05-35906 GRABER, Circuit Judge, dissenting:

I respectfully dissent because, although the majority correctly identifies the governing legal principles, I conclude that the arbitrator's decision was completely irrational.

Paragraph 12(a) of the Lease provides, as relevant here, that "Tenant shall comply with all federal, state and local environmental laws and regulations in its use of the Premises." Paragraph 12(c) of the Lease provides that the tenant shall not be held liable for certain items "[t]o the extent Tenant has been in compliance with applicable environmental laws." In context, the only rational reading of the phrase "applicable environmental laws" in Paragraph 12(c) is as shorthand for "all federal, state and local environmental laws and regulations in [Tenant's] use of the Premises," the

longhand description just given in Paragraph 12(a). That is, any environmental law with which the tenant was required to comply in its use of the premises was "applicable" within the meaning of Paragraph 12 as a whole. Paragraph 12(b) confirms the necessity of interpreting "applicable" in this way because it provides that the tenant "assumes all responsibility for the investigation and cleanup" of any hazardous waste on the premises and that the tenant is liable for, and must indemnify the landlord for, all costs resulting directly or indirectly from the "presence" of any hazardous waste on the premises.

This understanding of Paragraph 12 arises not only from the words and structure of the Lease, but also from the arbitrator's own findings as to the parties' intent. The arbitrator found that Mattel agreed to a comprehensive indemnification of Hall Street, irrespective of the time of the occurrence that resulted in the presence of hazardous wastes on the premises.

It is undisputed that the statute in question here is an "environmental law." The arbitrator's conclusion that the statute was not "applicable" is completely irrational in view of (a) the clear meaning of Paragraph 12 and (b) the undisputed facts that Mattel failed to test the water supply for eighteen years even though the statute required it to have done so, resulting in Mattel's signing of a consent order with the state's Department of Environmental Quality.

Accordingly, I would either affirm the decision of the district court (albeit on different grounds) or remand the case for reconsideration under the appropriate legal standard.

(6)

No. 06-989

Supreme Court, U.S.
FILED
JUL 27 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Hall Street Associates, L.L.C., was the plaintiff in the district court and cross-appellant/appellee in the Ninth Circuit Court of Appeals.

Mattel, Inc., Tyco Industries, Inc., Tyco Manufacturing Corp., Tyco Toys, Inc., and View-Master Ideal Group, Inc. were defendants in the district court. Mattel, Inc. was appellant/cross-appellee in the Ninth Circuit Court of Appeals. The other defendants were not parties in the Ninth Circuit Court of Appeals.

Petitioner Hall Street Associates, L.L.C. previously filed a corporate disclosure statement pursuant to Rule 29.6 with the petition for writ of certiorari. No amendments to the prior statement are necessary at this time.

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IN THE

Supreme Court of the United States

No. 06-989

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE PETITIONER

Hall Street Associates, L.L.C. ("Petitioner" or "Hall Street") respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case to the Ninth Circuit with instructions to enforce the judicial review provision in the parties' arbitration agreement.

OPINIONS BELOW

The decisions of the United States District Court for the District of Oregon, and the decisions of the United States Court of Appeals for the Ninth Circuit, in this case are

unreported. (Pet. App. 39a-58a; 117a-128a; Jt. App. 140-142; 155-158.)[1]

JURISDICTION

The Ninth Circuit entered its most recent decision in this case on August 1, 2006. The Ninth Circuit denied a timely petition for rehearing en banc on October 17, 2006. The petition for writ of certiorari was filed on January 12, 2007, and was granted on May 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

The appendix to Hall Street's Petition for Writ of Certiorari contains the relevant statutory provisions, namely, 9 U.S.C. §§ 2, 9, 10, and 11. (Pet. App. 1a-3a.)

STATEMENT OF THE CASE

Since the enactment of the Federal Arbitration Act ("FAA") in 1925, the use of arbitration has become increasingly common, benefiting litigants by providing a mechanism for efficient and expeditious resolution of disputes and benefiting the judiciary by lessening its burden. Notwithstanding those benefits, many parties are reluctant to use arbitration—particularly in commercial disputes of any monetary significance—due to concerns about reliability and adherence to the law in the arbitral decision-making process.

The parties to this case shared those concerns. To address them, the parties, in the middle of on-going litigation in federal court, agreed to arbitrate a portion of the issues in their case on the condition that the federal court retained authority to review the arbitral decision for legal error. The question in this case is whether the Ninth Circuit erred in

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[1] The Appendix filed by Petitioner Hall Street with its petition for writ of certiorari is referred to herein as "Pet. App." The Joint Appendix filed with this merits brief is cited as "Jt. App."

refusing to enforce the terms of the parties' agreement providing for judicial review of the arbitration award for legal error. Because the FAA does not prevent courts from enforcing arbitration agreements stipulating to judicial review for legal error, Hall Street asks this Court to reverse the decision of the Ninth Circuit invalidating the judicial review provision in the parties' arbitration agreement.

A. Factual Background

This case stems from a property lease dispute between Hall Street and Respondent Mattel, Inc. ("Mattel"). Starting in 1981, Mattel and its predecessors leased property from Hall Street on which Mattel and its predecessors operated a toy manufacturing facility. (Pet. App. 18a.) The lease between Mattel and Hall Street contained no agreement to arbitrate disputes. Instead, the lease preserved both parties' right to have all claims arising under the lease resolved by court adjudication. (Jt. App. 73-114.)

Section 12(a) of the parties' lease required Mattel to comply with all federal, state, and local environmental laws and regulations in its use of the leased property. (Jt. App. 85.) Among other applicable laws, an Oregon state law—namely, the Oregon Drinking Water Quality Act, OR. REV. STAT. § 448.114 *et seq.* —required Mattel to regularly test the well water on the leased property for environmental contaminates.

Although its employees regularly used the well water on the leased property for drinking and bathing, Mattel and its predecessors failed to comply with the testing requirements of the Oregon Drinking Water Quality Act during the approximately 18 years that they occupied the property. (Pet. App. 26a, 52a, 81a.) After Hall Street commissioned environmental consultants to test the well water on the property in 1998, Hall Street discovered that the well water was contaminated with trichloroethylene ("TCE") in concentrations significantly above federal limits. (Pet. App. 26a-27a.)

On February 10, 2000, Hall Street filed a complaint in Oregon state court seeking injunctive and declaratory relief, as well as monetary damages, for Mattel's breach of the parties' lease agreement. (Dist. Ct. Docket No. 1.) Mattel removed the case to the United States District Court for the District of Oregon based on the diversity of the parties. (*Id.*)

In the district court, the parties conducted a court trial on one issue in the case involving Mattel's termination of the lease. After the district court decided that issue—and after a subsequent unsuccessful attempt to settle the entire case through mediation—the parties proposed to the district court to arbitrate the remaining issues in the case. (Jt. App. 46.) The proposed arbitration agreement allowed either party to seek district court review of the arbitral decision for substantial evidence and errors of law. (Pet. App. 8a, 46a.)

At the time the parties made their proposal to arbitrate, the parties and the district court were bound by the decision of the Ninth Circuit in *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), *vacated sub nom. Kyocera Corp. v. Prudential-Bache T Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc) *petition for cert. dismissed*, 124 S. Ct. 980 (2004). In *LaPine*, the Ninth Circuit held that nothing in the FAA precludes parties from agreeing to deviate from the statutory grounds for vacatur and agreeing to allow federal courts to review an arbitration award for legal error. Based on *LaPine*, the district court approved the parties' agreement to arbitrate the remaining issues and agreed to confirm the arbitration award only if it was free from legal error. (Pet. App. 8a, 46a.)

B. The Arbitration Agreement

The parties' arbitration agreement contained several provisions relating to the district court's review of the arbitration award. First, to facilitate that review, Paragraph 1 of the arbitration agreement specified that the "arbitrator shall

prepare written findings of fact and conclusions of law that may be reviewed" by the district court at the request of either party. (Pet. App. 5a.) The arbitration agreement also specified the standard of review of the arbitration award:

> The arbitrator shall decide the matters submitted based upon the evidence presented and the applicable law. The arbitrator shall issue a written decision which shall state the basis of the decision and include specific findings of fact and conclusions of law. The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award, or by vacating, modifying or correcting the award. *The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.*

(Pet. App. 16a) (emphasis added).

The paragraph of the arbitration agreement entitled "Confirmation of Award by Judgment" conditioned confirmation of the arbitral decision on the district court first reviewing the arbitration award for substantial evidence or legal error at the request of either party. (Pet. App. 15a.)

The judicial review provision was crucial to the parties' willingness to arbitrate the remainder of their dispute because of the high stakes at issue in the case.[2] (Jt. App. 52.) Following the district court's approval of the agreement, the parties proceeded to arbitration to resolve the remaining issues in the case.

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[2] In an affidavit to the district court on Hall Street's motion for review of the arbitration award for legal error, Hall Street's trial attorney averred that the judicial review provision was "[o]ne of the primary features of this arbitration agreement." (Jt. App. 52.)

C. Procedural History

1. *The Original Arbitration Decision*

In January 2002, the arbitrator issued his "Findings of Fact and Conclusions of Law." (Pet. App. 17a-38a.) The arbitrator determined that Mattel's predecessor, View-Master, was "the only party with intimate knowledge of the property" when the parties negotiated the lease and that the lease therefore contained a broad indemnification clause that required Mattel to "indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease." (Pet. App. 19a.) The arbitrator further concluded that the lease imposed liability on Mattel for the presence of hazardous waste on the property irrespective of the time when the presence or use of the hazardous waste occurred. (Pet. App. 35a.) The arbitrator determined that the "only exception" to the indemnity obligation was if Mattel: (1) complied with all applicable federal, state, and local environmental laws; and (2) did not directly or indirectly contribute to the presence or use of hazardous waste on the property. (*Id.*)

In his findings of fact, the arbitrator found that Mattel and its predecessor had failed to comply with the testing requirements of the Oregon Drinking Water Quality Act during the approximately 18 years that they occupied the property. (Pet. App. 26a.) Notwithstanding that factual finding, however, the arbitrator concluded that Mattel's admitted failure to comply with the Oregon Drinking Water Quality Act was not a violation of any "applicable environmental law" under the lease. According to the arbitrator, the Oregon Drinking Water Quality Act was not an "applicable environmental law" because the statute sought to protect human health and was "not designed to protect landowners from having their property protected from environmental contamination." (Pet. App. 35a-36a.) The arbitrator determined that Mattel's failure to comply with Oregon water testing requirements "may

constitute a violation of other laws, but does not constitute a violation of 'applicable environmental laws' regarding TCE." (*Id.*) Based on that conclusion, the arbitrator ruled that Mattel was entitled to the contractual exception to the broad indemnification requirements of the lease. (*Id.*)

2. *The District Court's Review of the Arbitrator's Original Decision and the Subsequent Arbitration Decision*

After the arbitrator issued his decision concluding that Mattel had no indemnification obligations, Hall Street filed a motion with the district court seeking review of the arbitrator's decision. (Pet. App. 40a.) Mattel also filed a "contingent appeal" with the district court. (Pet. App. 56a.) Both parties sought judicial review in accordance with the standard of review set forth in their arbitration agreement and approved by the district court. In its motion, Hall Street did not contest any factual findings of the arbitrator, arguing instead that the arbitrator had committed legal error in concluding that Mattel's admitted violation of the Oregon Drinking Water Quality Act was not a violation of an "applicable environmental law." (Pet. App. 51a.)

After briefing and argument by both parties, the district court granted Hall Street's motion to vacate and remanded the matter to the arbitrator for further consideration. (Pet. App. 51a.) Relying on the arbitrator's factual finding that Mattel and its predecessors had failed to test for TCE contamination on the property for a period of approximately 18 years, the district court adopted the arbitrator's legal conclusion that Mattel had violated the Oregon Drinking Water Quality Act. (Pet. App. 42a-43a, 52a.) The district court also adopted the arbitrator's legal conclusion that the lease was "written to impose broad liability on the tenant for any environmental damage on the property" unless Mattel "was in compliance with all 'applicable environmental laws.'" (Pet. App. 53a.)

After agreeing with those legal conclusions, however, the district court parted ways with the arbitrator. Specifically, the district court held that the arbitrator erred in concluding that the Oregon Drinking Water Quality Act is not an "applicable environmental law." (Pet. App. 53a.) The district court explained:

> The arbitrator's contrary reasoning—that Oregon's Drinking Water Quality Act ("ODWQA") does not constitute "applicable environmental laws" because "these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking the water, and are not designed to protect landowners from having their property protected from environmental contamination"—is an overly restrictive construction of "applicable environmental laws." * * * *No* environmental statute advances such a purpose; the *purpose* of such statutes is to protect the environment and human health.

(Pet. App. 53a-55a (emphasis in original).) The district court went on to state that the arbitrator's conclusion that the Oregon Drinking Water Quality Act is not an applicable environmental statute "defies logic" and remanded the matter to the arbitrator. (Pet. App. 55a.)

On remand, the arbitrator entered an amended decision based on the district court's ruling that the Oregon Drinking Water Quality Act qualified as an applicable environmental law. (Pet. App. 81a.) Based on his conclusion that Mattel had violated the law, the arbitrator ruled that no exceptions to Mattel's indemnification agreement applied. (*Id.*) As a result of that conclusion, the arbitrator rendered a decision in favor of Hall Street in the amount of $583,971.60. The arbitrator also awarded declaratory relief against Mattel for all future costs that Hall Street might be required to pay relating to the environmental cleanup of the property. (Pet. App. 85a.) The

arbitrator then rendered a supplemental decision awarding attorney fees and costs to Hall Street. (Jt. App. 70-72.)

Both Hall Street and Mattel filed motions with the district court seeking review of the arbitrator's amended decisions. (Pet. App. 87a.) Again, both parties sought review in accordance with the standard of review agreed to by the parties in their arbitration agreement and approved by the district court. (Pet. App. 89-90a, 98a.) Other than correcting the arbitrator's computation of prejudgment interest, the district court upheld the arbitrator's amended award. (Pet. App. 95a, 110a.) On May 14, 2003, the district court issued a judgment incorporating both the court's initial decision regarding the lease termination issue (which had been tried before the court) and the arbitrator's amended award in favor of Hall Street. (Pet. App. 111a-113a.) The money judgment in Hall Street's favor amounted to $810,107.49, with six percent (6%) post-judgment interest. (*Id.*)

3. *The Decision of the Ninth Circuit on Enforceability of the Parties' Judicial Review Provision*

Both sides appealed to the Ninth Circuit from certain aspects of the district court's judgment. Notably, in the time between the district court's approval of the parties' arbitration agreement and the filing of the parties' appeals from the district court's judgment, the Ninth Circuit reversed its decision in *LaPine* holding that the FAA's statutory grounds for modification or vacatur of an arbitral decision were not exclusive. In *Kyocera Corp. v. Prudential-Bache T Services, Inc.*, 341 F.3d 987 (2003) (en banc), *petition for cert. dismissed*, 124 S. Ct. 980 (2004), the Ninth Circuit concluded that the FAA precluded parties from modifying the statutory grounds for vacatur of arbitral awards to authorize judicial review of an arbitration award for legal error. *Id.* at 1000.

Based on its decision in *Kyocera*, the Ninth Circuit reversed the district court's judgment in this case, stating in

an unpublished opinion that "*Kyocera* compels us to vacate the district court's judgment based on the arbitration agreement and remand to the district court." (Jt. App. 141.) Again relying on *Kyocera*, the Ninth Circuit also held that "the terms of an arbitration agreement controlling the mode of judicial review are unenforceable and severable." (*Id.*) In remanding the case, the Ninth Circuit instructed the district court to confirm the arbitrator's initial award in favor of Mattel "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." (Jt. App. 142.)

4. *The District Court's Decision on Remand and Subsequent Appeal*

On remand, the district court held that grounds for vacating the arbitrator's award existed under 9 U.S.C. section 10. (Pet. App. 117a-128a.) Relying on the decisions of the Ninth Circuit in *Theis Research Inc. v. Brown & Bain*, 386 F.3d 1180, 1185 (9th Cir. 2004), *amended on denial of rehearing*, 400 F.3d 659 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1429 (2006), and *Employer's Insurance of Wausau v. National Union Fire Insurance Co. of Pittsburgh*, 933 F.2d 1481 (9th Cir. 1991), the district court concluded that an arbitrator exceeds his or her powers within the meaning of 9 U.S.C. section 10 when the arbitral award is based on an "implausible interpretation of a contract." (Pet. App. 124a.) Noting that neither party seriously disputed that the Oregon Drinking Water Quality Act was an environmental law or that Mattel had violated it, the district court determined that nothing in the lease supported the arbitrator's conclusion that the phrase "applicable environmental laws" meant "anything other than its plain meaning, *i.e.*, the body of environmental law that generally applies to Mattel and with which Mattel's non-compliance could expose Mattel or Hall Street to civil or criminal penalties." (Pet. App. 125a-126a.) Based on its

conclusion that the arbitrator's decision resulted from an implausible interpretation of the parties' lease, the district court again vacated the original arbitration award, granted Hall Street additional attorney fees and costs, and again entered judgment in favor of Hall Street. (Pet. App. 127a-128a.)

Mattel appealed to the Ninth Circuit. On August 1, 2006, a majority of a panel of the Ninth Circuit reversed the district court's judgment, holding that "[i]mplausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. §§ 10 or 11." (Jt. App. 156.) In doing so, the panel majority explained that, "[a]lthough the arbitrator's assessment of the merits in this case contains possible errors of law, those errors are not a sufficient basis for a federal court to overrule an arbitration award." (*Id.*) Despite its acknowledgement of possible errors of law, the panel majority held that the arbitrator's decision was not "completely irrational," which it recognized as a valid nonstatutory basis for vacating an arbitration award under the FAA. (Jt. App. 157.) The panel majority remanded the case to the district court with instructions to enforce the original arbitration award and to declare Mattel the prevailing party. (*Id.*)

Judge Susan Graber dissented on the ground that the arbitrator's award was "completely irrational." (*Id.*) She stated that "the only rational reading" of the term "applicable environmental laws" was "all federal, state, and local environmental laws and regulations" which Mattel was required to comply with in its use of the premises. (*Id.*) Because no reasonable dispute existed that the Oregon Drinking Water Quality Act was an applicable environmental law that Mattel had violated, Judge Graber would have either upheld the district court under the "completely irrational" standard or remanded the case to the district court for reconsideration under that standard. (Jt. App. 158.)

Hall Street sought en banc review of the decision. The Ninth Circuit denied that request by order on October 17,

2006. (Pet. App. 138a.) Hall Street then filed a timely petition for a writ of certiorari with this Court, asking for review of the legal issue whether the FAA prohibited parties to an arbitration agreement from agreeing to judicial review of an arbitration award beyond the grounds set forth in the FAA. On May 29, 2007, this Court granted Hall Street's petition.

SUMMARY OF THE ARGUMENT

Sections 10 and 11 of the Federal Arbitration Act ("FAA") provide procedural mechanisms for parties to an arbitration agreement to petition a federal court for vacatur or modification of an arbitration award. 9 U.S.C. §§ 10, 11. The question in this case is whether sections 10 and 11 prescribe the exclusive grounds upon which a federal court may vacate or modify an arbitration award, or whether the FAA permits parties to stipulate to vacatur or modification of an arbitration award for legal error.

An examination of the FAA, this Court's case law, and the legislative history of the statute provides a clear answer to that question: The FAA does not prevent enforcement of an arbitration provision clearly and unambiguously stipulating to judicial review of an arbitration award for legal error because such a provision furthers the goals and policies of the FAA and is consistent with the court's normal judicial functions.

The primary purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Section 2 of the FAA imposes a presumption of enforceability of arbitration agreements, providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In view of that broad mandate, this Court repeatedly has held that private agreements to arbitrate must be rigorously enforced according to their terms, even if those

terms deviate from the FAA's statutory provisions. *See, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Volt Info. Sciences*, 489 U.S. at 479.

Nothing in the FAA suggests that any different rule should apply to the FAA's judicial review provisions. Section 9 of the FAA authorizes "parties in their agreement" to determine whether "a judgment of the court shall be entered upon the award made pursuant to the arbitration[.]" 9 U.S.C. § 9. By deferring to the parties' agreement on whether a judgment shall be entered, section 9 necessarily allows parties to specify in their agreement the circumstances under which a judgment shall not be entered on an arbitration award. Those circumstances may include conditions on court confirmation of an award which are different than the statutory grounds for vacatur or modification under sections 10 or 11. Parties who stipulate to judicial review for legal error agree to court confirmation of the arbitration award only if the award is free from legal error, and nothing in the text or structure of the FAA prevents parties from striking such a bargain.

This Court's case law confirms that view. As an initial matter, this Court itself implicitly has recognized that sections 10 and 11 do not prescribe the exclusive grounds for vacatur or modification of an arbitration award because this Court has approved other judicially-created exceptions to confirmation of arbitration awards. *See, e.g., Wilko v. Swan*, 346 U.S. 427, 436 (1953) (manifest disregard of the law), *overruled on other grounds by Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Moreover, this Court repeatedly has instructed that the FAA permits parties to specify their own procedural rules for arbitration, even if those rules alter the role of the court set out in the FAA itself. *See, e.g., Volt Info. Sciences*, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements

to arbitrate."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (parties may agree to have arbitrator decide arbitrability of dispute). Those decisions establish that litigants may agree to vary or supplement the provisions of the FAA—including provisions relating to the role of the courts—so long as their stipulated procedures do not do "violence to the policies behind the FAA," *Volt Info. Sciences*, 489 U.S. at 479, and are consistent with the court's normal judicial functions.

An arbitration agreement, entered into in the middle of ongoing federal litigation, which clearly and unmistakably preserves the court's ability to correct an arbitrator's erroneous legal conclusion, does not offend the goals and policies of the FAA or unduly burden the federal judiciary. The legal error review provision in the parties' arbitration agreement has clear precedents in federal jurisprudence. Review for legal error is among the normal judicial functions of the federal district courts. District courts regularly review for legal error in court adjudications when litigants object to magistrate decisions, *see* FED. R. CIV. P. 72(b), or when litigants consent to the appointment of a special master, *see* FED. R. CIV. P. 53(g). District courts also review for legal error in the context of bankruptcy proceedings. *See, e.g.*, 28 U.S.C. § 157(c)(1) (so providing). Thus, the legal error review provision in the parties' arbitration agreement invokes a familiar role for the courts.

The parties' arbitration agreement in this case also did not usurp any congressional power or dictate to the court how to conduct its judicial proceedings. To the contrary, the district court fully endorsed the parties' agreement and entered it as an order of the court. Nor did the parties' agreement purport to confer federal jurisdiction. It is well-settled that the FAA is not a jurisdictional statute and that any case before a federal district court under the FAA must have an independent jurisdictional basis. *Moses H. Cone Mem'l Hosp. v.*

Mercury Constr. Corp., 460 U.S. 1, 25 n. 32 (1983). In this case, no question exists that the district court possessed jurisdictional authority to resolve the parties' dispute. Indeed, the district court decided one aspect of the case before the parties agreed to arbitrate the remaining issues. If the parties to this case had not entered into their arbitration agreement, the district court would have been required to preside over the entire proceeding and dispose of all issues in the case. By submitting part of their case to arbitration, the parties reduced—rather than increased—the burden of the district court by eliminating the need for plenary adjudication in favor of a more limited judicial review.

Consistent with the purpose of the FAA and this Court's precedents, numerous lower courts have held that the statutory grounds for vacatur and modification of arbitrations awards in sections 10 and 11 of the FAA are not exclusive. Those courts allow parties to supplement those provisions by clear and unambiguous agreement so long as the stipulated procedures are consistent with the goals and policies of the FAA and are consistent with the court's normal judicial functions. *See, e.g., Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287, 292-93 (3d Cir.), *cert. denied*, 534 U.S. 1020 (2001); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 (5th Cir. 1995). In doing so, those courts recognize that the FAA does not preclude parties from "opt[ing] out of the FAA's off-the-rack vacatur standards and fashion[ing] their own [standards]." *Roadway Package Sys. Inc.*, 257 F.3d at 293.

Finally, the policies of the FAA favoring arbitration and the enforcement of arbitration agreements according to their terms supports the view that the FAA permits parties to contract for judicial review of arbitration awards for legal error. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Sciences*,

489 U.S. at 479. Allowing parties the freedom to stipulate to judicial review for legal error promotes arbitration by appealing to parties who otherwise would be reluctant to arbitrate for fear of a legally erroneous award without a chance for meaningful review. Although permitting parties to make such stipulations may require courts, on occasion, to engage in a more searching inquiry than the limited grounds for review under the FAA, those agreements nevertheless will reduce the burden on the judiciary by increasing the number of parties willing to participate in arbitration, particularly in commercial disputes of monetary significance. Taken together with the express terms of the statute and this Court's case law, those considerations confirm the enforceability of arbitration agreements providing for judicial review of arbitration awards for legal error.

ARGUMENT

Similar to other provisions in the Federal Arbitration Act ("FAA"), the statutory provisions for judicial review of arbitration awards under the FAA are not exclusive. Instead, parties may supplement those provisions by clear and unambiguous agreement so long as their stipulated procedures do not frustrate the goals and policies of the FAA and are consistent with the court's normal judicial functions. Because arbitration provisions providing for judicial review of arbitration awards for legal error are consistent with the goals and policies of the FAA and employ a standard of review which district courts regularly apply in a variety of contexts, those provisions are entitled to enforcement under the FAA.

I. THE FAA SUPPORTS ENFORCEMENT OF THE PARTIES' AGREEMENT STIPULATING TO JUDICIAL REVIEW FOR LEGAL ERROR

In *Kyocera Corp. v. Prudential-Bache T Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *petition for cert. dis-*

missed, 124 S. Ct. 980 (2004), the Ninth Circuit concluded that sections 10 and 11 of the FAA prescribe the exclusive grounds for vacatur or modification of an arbitration award, explaining that "because Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others." *Id.* at 1000. The Ninth Circuit's conclusion finds no support in the FAA.

Passage of the FAA "was motivated, first and foremost, by a congressional desire to enforce [arbitration] agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Bryd*, 470 U.S. 213, 220 (1985). In view of that overriding purpose, this Court repeatedly has held that the FAA permits parties to specify their own procedural rules for arbitration, even if those rules deviate from the procedural rules set out in the FAA itself. *See, e.g., Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 486, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."). Nothing in the text or history of the FAA suggests that any different rule applies to the FAA's judicial review provisions. The Ninth Circuit's contrary conclusion requires reversal.

A. Overview of the FAA

The FAA was enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (noting same). The Act's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.*

To promote the enforcement of arbitration agreements, the FAA first declares that written agreements to arbitrate "shall

be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA then confers federal courts with specific authority to enforce arbitration agreements. Among other things, the FAA authorizes federal courts to: (1) stay litigation until the arbitration has been conducted "in accordance with the terms of the [parties' arbitration] agreement," 9 U.S.C. § 3; (2) compel parties to submit to arbitration "in accordance with the terms of the agreement," 9 U.S.C. § 4; (3) appoint neutral arbitrators, 9 U.S.C. § 5; and (4) compel appearances of witnesses at arbitration hearings, 9 U.S.C. § 7.

The FAA also confers federal courts with authority to review arbitration awards. If the parties authorize the court to do so in their agreement, a district court may confirm and enter a judgment on an arbitration award. 9 U.S.C. § 9. In addition, a party to an arbitration agreement may petition a district court for vacatur or modification of an arbitration award. Section 10 of the FAA states that the district court "may" vacate an arbitration award when: (1) the arbitration award was procured by corruption, fraud, or undue influence; (2) evidence exists of partiality or corruption among the arbitrators; (3) the arbitrators committed misconduct prejudicing the rights of a party; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10. Section 11 authorizes modification of the arbitration award when: (1) the award contains evident material miscalculations of figures or mistakes in descriptions of persons, things, or property; (2) the arbitrators have issued an award on a matter not submitted to them; or (3) the award is imperfect in its form. 9 U.S.C. § 11.

As explained below, an examination of sections 10 and 11 in their statutory context makes clear that those provisions are not the exclusive grounds upon which a district court may vacate or modify an arbitration award. Instead, parties may supplement those provisions by express agreement so long as their stipulated procedures do not frustrate the goals and

policies of the FAA and are consistent with the court's normal judicial functions.

B. Sections 10 and 11, Viewed in Context of the FAA as a Whole, Support the Enforcement of Arbitration Provisions Stipulating to Judicial Review for Legal Error

The text of the FAA is silent on the question of whether its statutory provisions—including the provisions for vacatur and modification of arbitration awards under sections 10 and 11—may be varied by private contract. When sections 10 and 11 are viewed in the broader context of the FAA as a whole, however, it is clear that those provisions—like other provisions in the FAA—are not intended to limit parties' ability to contract for specific arbitration procedures. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997) (statutory text must be construed in view of "the specific context in which that language is used, and the broader context of the statute as a whole"). *See also Volt Info. Sciences*, 489 U.S. at 479 (parties may "specify by contract the rules under which [their] arbitration will be conducted"). Instead, in deciding the enforceability of judicial review provisions supplementing sections 10 and 11, the proper inquiry is whether the particular agreement at issue "undermine[s] the goals and policies of the FAA," *Volt Info. Sciences*, 489 U.S. at 478, and prescribes a procedure that is consistent with the court's normal judicial functions. Because arbitration provisions stipulating to judicial review for legal error satisfy those standards, such provisions are enforceable under the FAA.

1. *Sections 10 and 11 Do Not Prohibit Parties from Stipulating to Judicial Review of Arbitral Decisions for Legal Error*

Sections 10 and 11 of the FAA set out limited grounds upon which a court may vacate or modify an arbitration

award. Three out of the four statutory grounds for vacatur under section 10 relate to defects in the arbitration process itself, such as fraud, corruption, or misconduct by the arbitrators. 9 U.S.C. § 10(a)(1)-(3). The fourth statutory ground for vacatur arises when the arbitrator exceeds his or her power, or so imperfectly executes it that no "mutual, final, and definite award" was made. 9 U.S.C. § 10(a)(4). The statutory grounds for modification of an arbitration award under section 11 are similarly narrow, authorizing courts to correct certain errors unrelated to the merits of an arbitration award. 9 U.S.C. § 11.

On their faces, sections 10 and 11 do not prohibit parties from supplementing those statutory grounds for vacatur or modification of arbitration awards by stipulating to judicial review for legal error. No evidence exists that Congress intended to limit the ability of private parties to stipulate to judicial review for legal error. Indeed, when sections 10 and 11 are viewed in the context of the FAA as a whole, it appears that Congress intended the opposite.

This Court has held that statutory ambiguities should be resolved in a manner consistent with the primary purpose of the statute. *Robinson*, 519 U.S. at 346. *See also Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006) (same). Any ambiguity in sections 10 and 11 therefore must be resolved with due regard for the mandate of section 2 – the FAA's primary substantive provision – and the FAA's primary purpose: to enforce arbitration agreements according to their terms. *See Volt Info. Sciences*, 489 U.S. at 478-79 (stating that "Congress' principal purpose" in enacting the FAA was "ensuring that private agreements to arbitrate are enforced according to their terms"). As described in more detail below, the context of the FAA as a whole does not support interpreting sections 10 and 11 as prescribing the exclusive grounds for vacatur and modification of arbitration awards under the FAA.

2. *Section 2 is the Primary Substantive Provision of the FAA and Strongly Supports Enforcement of the Parties' Judicial Review Provision.*

Section 2 of the FAA provides that a "written provision . . . to settle by arbitration" a controversy arising out of "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 is the "primary substantive provision" of the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It is the FAA's "centerpiece provision," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), and it establishes a "broad principle of enforceability" of arbitration agreements. *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

Although "generally applicable contract defenses, such as fraud, duress, or unconscionability" apply equally to arbitration agreements, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), section 2 mandates that agreements to arbitrate otherwise must be "rigorously enforce[d]." *Byrd*, 470 U.S. at 221. *See also Mitsubishi Motors Corp.*, 473 U.S. at 625 ("The 'liberal federal policy favoring arbitration agreements,' . . . manifested by [section 2] and the Act as a whole, is at bottom a policy guaranteeing the [illegible] of private contractual arrangements [to arbitrate] [illegible] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). Indeed, this Court has described the enforcement of arbitration agreements "according to their terms" as the "central purpose" of the FAA. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotation marks and citations omitted).

The "broad principle of enforceability" manifested by section 2 provides strong contextual support for the view that sections 10 and 11 are standards for judicial review which

parties are free to supplement with judicial review provisions that are consistent with the court's normal judicial functions. Nothing in section 2—or any other provision of the FAA—suggests that Congress contemplated an exception to the "broad principle of enforceability" for arbitration agreements allowing judicial review for legal error. Instead, because legal error is an ordinary standard of judicial review which courts are accustomed to applying and which is well within the scope of a court's normal judicial functions, the mandate of section 2 strongly suggests that such provisions should be enforced.[3]

3. *Section 9 of the FAA Supports Enforcement of the Parties' Judicial Review Provision*

The statutory provisions providing for judicial review of arbitration awards also support the view that the FAA does not prescribe the exclusive grounds for vacatur or modification of arbitration awards. Section 9 of the FAA is the statutory provision which authorizes district courts to confirm

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[3] The legislative history of the FAA confirms that Congress sought to ensure enforcement of arbitration agreements in passing that statute. The initial House Report on the FAA describes the comprehensive objective of the Act as "to make valid and enforcible [*sic*] agreements for arbitration. . . ." H. R. REP. NO. 68-96, at 1 (1924). The initial Senate Report similarly emphasized the "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into." S. REP. NO. 68-536, at 3 (1924). *See also* James M. Gaitis, *Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 48 (2007) ("There is nothing in the legislative history of the FAA to suggest that, in addition to the primary policy objective of the enforcement of agreements to arbitrate, the FAA promoted an utterly contradictory exception to that policy whereby any contractual expectation that an arbitral tribunal would correctly apply the law would be deemed unenforceable under the FAA." (emphasis omitted)).

and enter judgments on arbitration awards. That provision provides, in part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title * * *

9 U.S.C. § 9.

Section 9 prescribes that the court has authority to enter judgment on an arbitration award only if the parties have conferred that authority upon the Court in their arbitration agreement. By giving parties the power to determine whether a court may enter judgment on an arbitration award, section 9 necessarily confers parties with the authority to determine the circumstances under which a court may not enter judgment on an award. The authority vested in the parties by section 9 gives parties the freedom to deviate from the statutory grounds for vacatur or modification under sections 10 or 11 and to determine by individual contract the prerequisites for confirmation of an arbitration award. Since the court's authority to enter judgment derives exclusively from the parties' agreement, parties may expressly agree, just as the parties did in this case, that a court will not enter judgment on an award based on erroneous conclusions of law. *See* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOTIATION L. REV. 171, 181 (2003) (arguing that parties who agree to judicial review provisions do "not agree to court confirmation unless supported under the standard provided for in the agreement").

Although parties obviously may not impose prerequisites to confirmation that would require courts to deviate from

their normal judicial functions, the text of section 9 signals that the standards for judicial review of arbitration awards under sections 10 and 11 of the FAA are not exclusive and may be supplemented by agreement of the parties. In this case, Hall Street and Mattel agreed in their arbitration agreement that the court had authority to confirm and enter judgment on the arbitration award only if the award was not based on erroneous conclusions of law. (Pet. App. 15a-16a.) Because the legal error standard of review at issue in this case is a standard that is consistent with normal judicial functions and the policies of the FAA, review for legal error is a permissible prerequisite to confirmation of the arbitration award under section 9.

C. This Court Implicitly Has Recognized that the FAA Does Not Prescribe the Exclusive Grounds for Vacatur or Modification of Arbitration Awards

This Court's case law implicitly recognizes that sections 10 and 11 do not prescribe the exclusive grounds for vacatur or modification of an arbitration award. Both this Court and the lower federal courts long have recognized the existence of numerous non-statutory standards of review that apply in reviewing arbitration awards under the FAA. Among other formulations not found in the statute's text, courts have refused to confirm an arbitration award where the award is in "manifest disregard of the law," "violates public policy," is "arbitrary or capricious," or is "completely irrational." *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (manifest disregard of the law), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (violates public policy); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000) (arbitrary and capricious); *French v. Merrill Lynch, Pierce, Fenner & Smith*, 784 F.2d 902, 906 (9th Cir. 1986) (completely

irrational); *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (award may be vacated if "not susceptible of the arbitrator's interpretation"); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000) (award may be vacated if contrary to the "plain language" of the contract). None of those judicially-created grounds for vacatur is set forth in section 10. The proliferation of these non-statutory, judicially-created grounds for vacatur illustrates that the vacatur standards of section 10 are not exclusive.

D. This Court Has Interpreted Other Provisions of the FAA As Default Provisions Which Parties May Supplement by Agreement

This Court's interpretation of other provisions of the FAA provides further contextual support for the view that sections 10 and 11 of the FAA do not prescribe the exclusive grounds for vacatur or modification of arbitration awards. Indeed, this Court repeatedly has instructed that parties are not bound by the procedural rules in the FAA and, instead, are free to fashion their own procedural rules for arbitration. As this Court explained in *Volt*, preventing "the enforcement of agreements to arbitrate under different rules than those set forth" in the FAA "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." 489 U.S. at 478-79.

Several decisions illustrate that point. In *Volt*, the parties' construction contract contained an agreement to arbitrate all disputes arising out of the contract. The contract also contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located," in that case, California. *Id.* at 470. California law permitted a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it. *Id.* at 471.

The FAA contains no provision permitting a court to stay arbitration pending resolution of related litigation involving third parties. Indeed, the FAA provides exactly the opposite. Section 3 of the FAA provides that any suits or proceedings brought "upon any issue referable to arbitration" shall be stayed pending arbitration. 9 U.S.C. § 3. Section 4 of the FAA also entitles a party as a matter of right to an order compelling arbitration. 9 U.S.C. § 4.

The appellant in *Volt* argued that sections 3 and 4 of the FAA did not allow application of California law to permit a stay of the arbitration. *Id.* at 476-77. In addressing that argument, this Court first noted that "[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 477. This Court then examined whether application of the conflicting California law "would undermine the goals and policies of the FAA." *Id.* at 478. This Court concluded that it would not, explaining:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration. *But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.* Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. *Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.* Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 478-79 (internal citations and quotations omitted; emphasis added).

This Court in *Volt* held that the parties' agreement to "abide by state rules of arbitration" was fully enforceable "even if the result is that arbitration will be stayed where the Act would otherwise permit it to go forward." *Id.* at 479. In reaching that holding, this Court explained that "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. By ruling that the FAA does not prevent the enforcement of agreements to arbitrate "under different rules than those set forth in the Act itself," *id.* at 478, this Court treated sections 3 and 4 of the Act as default rules, which applied only when the arbitration agreement was silent or ambiguous about a specific matter. *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (in upholding application of choice-of-law provision contained in arbitration agreement, this Court stated that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties").

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), is also instructive. Prior to *First Options*, it was well established that the court, and not the arbitrator, normally determines the arbitrability of a particular issue under the FAA. *See Mitsubishi Motors Corp.*, 473 U.S. at 626. *See also* 9 U.S.C. § 3 (vesting the court with the authority to decide whether an issue is "referable to arbitration"). In *First Options*, however, this Court recognized that, if "clear and unmistakable" evidence existed that the parties agreed to submit the question of arbitrability to the arbitrator and not the court, then the agreement must be enforced. 514 U.S. at 944. In doing so, the Court held that the question of "'who has the primary role to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943 (emphasis in original). The conclusion that the parties' agreement controlled flowed "inexorably from the fact that arbitration is simply a matter of contract between the parties." *Id.* Thus,

this Court sanctioned the right of parties to alter by contract the respective roles of the arbitrator and the court. This Court based its ruling on the principle that the "basic purpose" of the FAA is to "ensure judicial enforcement of privately made agreements to arbitrate." *Id.* at 945 (quoting *Byrd*, 470 U.S. at 219-20).

Volt and its progeny instruct that the express provisions of the FAA are non-exclusive standards which must yield to conflicting terms contained in a private arbitration agreement unless the conflicting provisions would do "violence to the policies behind the FAA." *Id.* at 479. Nothing in sections 10 and 11 suggests that judicial review provisions are subject to any different treatment. As the Ninth Circuit originally noted in *LaPine*, "the standards against which the work of the arbitrator will be measured are inexorably intertwined with the arbitration's scope, affect its whole structure, and may even encourage the arbitrator to adhere to a high standard of decision making." 130 F.3d at 889. Accordingly, when viewed in the light of the broader context of the statute as a whole, it is clear that the vacatur and modification standards set forth in sections 10 and 11 are not intended to restrict parties' ability to contract for different standards, so long as the standards to which the parties agree do not impair the FAA's fundamental policy favoring arbitration.

In this case, the parties "clearly and unmistakably" agreed to arbitrate certain issues in their case only if the district court retained authority to review the arbitrator's conclusions for legal error. Although that stipulated standard of review differs from the vacatur standards set forth in sections 10, the parties' standard neither undermines the goals and policies of the Act nor prescribes a procedure that is inconsistent with the court's normal judicial functions. *See infra* at pp. 31-40. Accordingly, the parties' judicial review provision is entitled to enforcement.

E. The Majority of the Circuit Courts of Appeal Considering This Issue Have Interpreted the FAA's Vacatur Standards As Non-Exclusive Standards Which Parties May Supplement by Agreement

Consistent with this Court's precedents and the text and context of the FAA, a number of federal circuit courts have enforced judicial review provisions in arbitration agreements. In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995), for example, the Fifth Circuit determined that the FAA's statutory review provisions provided a "default standard of review" applicable to a silent arbitration agreement but that "the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award." *Id.* at 997 n. 3. Relying on this Court's case law interpreting the FAA—particularly its decisions in *Volt Info. Sciences* and *First Options*—the court in *Gateway* concluded that "federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract" because doing otherwise "would be to render the language [of the arbitration agreement] meaningless and would frustrate the mutual intent of the parties." *Id.* at 997.[4]

In *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir.), *cert denied*, 534 U.S. 1020 (2001), the Third Circuit similarly described the FAA's statutory review standards as

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[4] The Fifth Circuit in *Gateway* was unimpressed with the rationale articulated by the district court judge who refused to enforce the parties' agreement on the ground that "the parties had sacrificed the simplicity, informality and expedition of arbitration on the altar of appellate review." *Id.* at 997 (internal quotation marks omitted). In finding the agreement entitled to enforcement under the FAA, the court pointed out that "[p]rudent or not, the contract expressly and unambiguously provided for review for 'errors of law'" rather than just the statutory standards for review under the FAA. *Id.*

part of the "FAA's default regime." *Id.* at 296-97. In that case, the court concluded that—just as they may opt out of other provisions under the FAA—parties may opt out of the statutory limits for judicial review of arbitration awards when they determine that it is in their best interests to do so. The First, Fourth, and Sixth Circuits also have reached those same conclusions. *See, e.g., Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir 2005) ("[P]arties can by contract displace the FAA standard of review, but that displacement can be achieved only by clear contractual language."), *cert. denied,* 126 S. Ct. 1785 (2006); *Jacada Ltd. v. International Mktg. Strategies*, 401 F.3d 701, 710-12 (6th Cir.) (same), *cert. denied,* 126 S. Ct. 735 (2005); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 U.S. App. LEXIS 21248, 1997 WL 452245, at *6-7 (4th Cir. August 11, 1997) (enforcing parties' expanded judicial review agreement, stating that agreement "supplements the FAA's default standard of review").[5] These cases faithfully apply the precedents of this Court and give full effect to the primary purpose of the FAA: to uphold the enforceability of arbitration agreements in accordance with their terms.[6]

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[5] The Fourth Circuit's rules provide that an unpublished case decided before January 1, 2007 may be cited if the case has "precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." (4TH CIR. LOCAL R.32.1.) There is no published opinion from the Fourth Circuit on the issue cited.

[6] Other circuits have not squarely addressed the enforceability of judicial review provisions in arbitration agreements. For example, in *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991), the Seventh Circuit stated in *dicta* that the parties "cannot contract for a judicial review" of a labor arbitration award "because federal jurisdiction cannot be created by contract." *Id.* at 1505. That case did not involve an agreement to expand judicial review, did not involve the FAA and is inapposite because the FAA, unlike Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not create an independent basis for federal question

II. THE GOALS AND POLICIES OF THE FAA ARE NOT UNDERMINED BY ENFORCEMENT OF ARBITRATION PROVISIONS ALLOWING JUDICIAL REVIEW FOR LEGAL ERROR

Prior to its decision in *Kyocera*, the Ninth Circuit also adhered to this Court's precedents upholding the strong federal policy favoring enforcement of arbitration agreements in accordance with their terms, stating: "We perceive no sufficient reason to pay less respect to the review provision than we pay to the myriad of other agreements which the parties have been pleased to make." *LaPine*, 130 F.3d at 889.

In *Kyocera*, however, the Ninth Circuit reversed course to follow the Tenth Circuit's decision in *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001). In both *Kyocera* and *Bowen*, the courts identified two grounds why the FAA did not permit judicial review provisions in arbitration awards. First, those courts expressed concerns that judicial review provisions would reduce the benefits of arbitration by making the arbitral process less efficient and streamlined and by hindering arbitrators' ability to fashion "creative remedies" that courts would be less likely to endorse. *See Bowen*, 254 F.3d at 935-36, 936 n. 7 (noting that concern); *Kyocera*, 341 F.3d at 1000 (same). Second, those courts expressed

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jurisdiction. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 26 (so stating). The Second and Eighth Circuits also have not definitively decided the permissibility of judicial review provisions in arbitration awards. *See, e.g., Hoeft v. M.V.L. Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003) (while taking no position on the enforceability of agreements to raise the level of judicial review of an arbitration award, the court ruled that private litigants could not completely divest the courts of authority to review the substance of the arbitration award and process under section 10 of the FAA); *UHC Mgmt. Co. v. Compute. Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998) (expressing skepticism as to whether the parties could agree to expanded judicial review but choosing not to adopt the Tenth Circuit's holding in *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001)).

concerns that allowing parties to contract for judicial review would compromise the integrity of the judiciary by allowing parties to dictate how courts resolve disputes, as well as potentially put "federal courts in the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures." *Bowen*, 254 F. 3d at 935-36; *see also Kyocera*, 341 F.3d at 1000 (noting same). As explained below, both concerns are misplaced when the standard of review at issue is review for legal error.

A. Promoting Efficiency in Arbitration Does Not Warrant Disregarding Parties' Clear and Unambiguous Agreements

Courts refusing to enforce judicial review provisions in arbitration agreements assert that judicial review of arbitration awards would undermine the efficiency and expediency of arbitration. That assertion disregards the contractual nature of arbitration. The FAA permits parties to fashion their arbitration agreements to best suit their individual needs, rather than imposing a "one-size-fits-all" approach. If parties wish to trade the efficiency and speed that may potentially result from the highly circumscribed judicial review prescribed by sections 10 and 11 for the greater predictability and adherence to the law that results from judicial review for legal error, the FAA does not preclude them from doing so. After all, enforcement of arbitration agreements in accordance with their terms is the principal purpose of the statute.

In *First Options*, this Court explained that "the basic objective in [the FAA] is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," but rather to ensure that arbitration agreements, like other contracts, are enforced according to their terms. *First Options*, 514 U.S. at 947. In *Byrd*, this Court echoed that sentiment, explaining:

> The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial en-

> forcement of privately made agreements to arbitrate. *We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.* The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements. . . .
>
> . . . [P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. . . .
>
> We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute.

Byrd, 470 U.S. at 219-20 (footnote omitted). *Accord Volt Info. Sciences*, 489 U.S. at 479 (enforcing arbitration agreement resulting in stay of the arbitration where express terms of FAA would otherwise permit arbitration to go forward); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 (FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement" (emphasis in original)); *First Options*, 514 U.S. at 947 ("[T]he basic objective [of the FAA] is not to resolve disputes in the quickest manner possible * * * but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and accord-

ing to the intentions of the parties." (citations and internal quotations omitted)).

In this case, the intention of the parties was unmistakably clear. Neither party agreed to "trade the greater certainty of correct legal decisions by federal courts for speed and flexibility." *Kyocera*, 341 F.3d at 998. Instead, the parties agreed to arbitration in the middle of on-going federal litigation, but only with the condition that the district court would retain authority to review the arbitration award for legal error. If parties—like the parties in this case—prioritize predictability and correct decision-making over speed and "creative remedies" in arbitration decisions, the FAA allows them to do so. Refusing to respect the parties' choice "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences*, 489 U.S. at 479. When the goals of enforcement of arbitration agreements and encouragement of efficient and speedy dispute resolution collide, this Court has consistently resolved the conflict in favor of enforcement.

B. Concerns Relating to Judicial Functioning and Integrity Are Not Implicated When Parties Seek Judicial Review for Legal Error in Arbitration Awards

Courts refusing to enforce judicial review provisions in arbitration agreements also assert that such provisions pose risks to judicial functioning and integrity. No doubt exists that parties lack authority to confer subject matter jurisdiction on federal courts, or to direct federal courts to deviate from their normal judicial functions. *See, e.g., LaPine*, 130 F.3d at 891 (Kozinski, J., concurring) (noting that parties could not direct courts to "review [an arbitration] award by flipping a coin or studying the entrails of a dead fowl"). Arbitration provisions providing for judicial review of arbitration awards for legal error, however, do not suffer from those defects.

The standard for vacatur or modification in the parties' arbitration agreement—that is, review for legal error—is a well-established standard of review that federal courts commonly employ in a variety of contexts. Federal district courts regularly review for legal error in court adjudications when litigants object to magistrate decisions, *see* FED. R. CIV. P. 72(b), or when litigants consent to the appointment of a special master, *see* FED. R. CIV. P. 53(g). District courts also undertake that type of review in the context of bankruptcy proceedings. *See, e.g.*, 28 U.S.C. § 157(c)(1). Thus, the parties' stipulation to judicial review for legal error is grounded in clear precedents in federal jurisprudence and is consistent with the courts' normal judicial functions.[7]

The parties' arbitration agreement also does not purport to ask the reviewing court to exceed the authority that the court would have in the absence of an arbitration agreement. The FAA is not a jurisdictional statute. Thus, any case before a federal district court under the FAA must have an independent jurisdictional basis. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n. 32. If the parties to this case had not entered into their arbitration agreement, the district court would have had plenary authority to adjudicate all issues in the case. By submitting a dispute to arbitration with only limited judicial review for legal error, parties lessen—not increase—the burden on federal district courts by eliminating the need for full adjudication in favor of more limited judicial review. *See LaPine*, 130 F.3d at 891 (Kozinski, J., concurring) ("[E]nforcing the arbitration agreement—even with enhanced

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[7] This Court has previously indicated its willingness to apply a judicial review standard arising out of the parties' contractual agreement. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the Court determined that the proper standard of review for a denial of benefits under ERISA, 29 U.S.C. §1132 (a) (1) (B), was the *de novo* standard, but observed that "neither general principles of trust law, nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review."

judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication."); *see also Bowen*, 254 F.3d at 936 n. 6 ("We recognize, of course, that even under expanded judicial review, arbitration reduces the burden on the district courts. . . . Reviewing an arbitration award is certainly less work than hearing the entire case pursuant to diversity or federal question jurisdiction.").

In this case in particular, there can be no claim that the parties imposed any additional burden on the court. The district court specifically approved of the parties' judicial review provision and entered the arbitration agreement as an order of the court during their ongoing litigation. Thus, the parties in no way "dictate[d] the manner in which the federal courts conduct judicial proceedings" or otherwise usurped any power reserved to Congress. *See Kyocera*, 341 F.3d at 1003. Indeed, the Ninth Circuit's refusal to enforce the parties' agreement in this case "place[d] an unwarranted limitation upon the power of district courts to control their own cases." *Cf. Moses H. Cone Mem'l Hosp.*, 460 U.S. at 31 (Rehnquist, J., dissenting). Just as a court might approve the use of a special master to facilitate resolution of a case, the district court here approved of the use of an arbitrator to achieve that same goal, reserving the court's authority to review the legal conclusions of the arbitrator just as a court would review the legal conclusions of a special master. Nothing in the FAA—nor in any other substantive law—precluded the court from retaining that authority when both parties clearly and unmistakably agreed to it.

Arbitration provisions stipulating to judicial review for legal error are enforceable even though they modify the role that the court would serve in the absence of such a stipulation. In the context of the FAA, this Court repeatedly has allowed parties to define their own arbitration procedures, even when those procedures alter the court's traditional role. For example, notwithstanding statutory provisions to the contrary,

this Court concluded that the FAA permits parties to elect to have an arbitrator—rather than the court—decide the arbitrability of a dispute. *First Options*, 514 U.S. at 943. This Court also has enforced choice-of-law provisions in arbitration agreements which allow the parties to dictate how the court interpreting an arbitration provision will function. *Volt Info. Sciences*, 489 U.S. at 478-79. Those decisions make clear that arbitration provisions are not invalid and unenforceable simply because they affect the role of the court in an arbitration proceeding.

Parties also affect the functioning of courts by private agreement in other contexts. Choice-of-forum clauses and liquidated-damages provisions, for example, both determine the functioning of the court to some degree. In addition, courts have permitted parties to waive affirmative defenses that would normally bar the court from deciding the case on the merits. In *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F.3d 152, 160 (2d Cir. 2003), for example, the Second Circuit held that the parties may agree to waive the statute of limitations for confirming an arbitration award under section 9 of the FAA. Absent the parties' stipulation, the FAA would have directed the court *not* to hear the dispute. *See also United States v. Wilson*, 26 F.3d 142, 154-56 (D.C. Cir. 1994) (discussing various cases upholding agreements to waive statutes of limitations).

In short, the mere fact that arbitration provisions providing for legal error review may alter the traditional scope of the court's review of arbitral decisions is not grounds for invalidation. Nothing in the language or policy underpinnings of the FAA precludes enforcement of judicial review provisions, so long as the stipulated procedures do not purport to confer jurisdiction where none exists and so long as the stipulated procedures are consistent with the court's normal judicial functions. Because such provisions also are consistent with the policies and goals of the FAA, provisions

stipulating to judicial review for legal error are entitled to enforcement.

C. The Federal Policies Favoring Enforcement of Private Arbitration Agreements, Efficient Resolution of Disputes and Judicial Economy Support Enforcement of the Parties' Arbitration Agreement in Accordance with Its Terms.

The FAA's strong policy favoring arbitration is well-served by allowing parties flexibility and freedom in fashioning their own arbitration procedures, including procedures allowing judicial review of arbitral decisions for legal error. Such flexibility not only reflects the contractual nature of arbitration, but also promotes arbitration and reduces the burden on the judiciary by encouraging arbitration of more complex commercial disputes.

Arbitration is a creature of contract, and parties entering into arbitration agreements have different reasons for doing so. For some parties, arbitration offers a mechanism to achieve creative solutions to a dispute. Other parties elect arbitration to keep the dispute resolution process as simple, quick, and economical as it can be. Those priorities may reflect the issues or amounts of money at stake, the frequency of disputes between the parties, or stem from any number of other reasons. For parties prioritizing efficiency and cost-effective resolution of disputes, the very limited default standards of review set forth in sections 10 and 11 of the FAA may be perfectly satisfactory and may be the scope of review which best suits their needs.

For other parties, however, the gravity of the legal issues or monetary amounts in dispute may make the parties unwilling to trade reliable decision-making and legal certainty for simplicity, expediency, and economy. In the Ninth Circuit, those parties have only two choices: litigate the dispute through court adjudication or arbitrate the dispute with no

mechanism to ensure that the arbitral result is legally correct. That stark choice undermines the attractiveness of arbitration and will drive many litigants and their attorneys to choose court adjudications over arbitration to ensure predictability and adherence to the law in the decision-making process.

This case illustrates that point. The parties already had commenced trial proceedings in court when they agreed to submit certain issues in their dispute to arbitration. The clear and unambiguous contract provision allowing judicial review for legal error was central to their agreement to arbitrate the remaining issues, and the parties would have bypassed arbitration if judicial review for legal error had been unavailable under Ninth Circuit precedents at that time. (Jt. App 52.) Arbitration was an attractive option to the parties because it allowed them to litigate the issues before the arbitrator with less onerous discovery and pretrial proceedings and to rely on the arbitrator as the fact finder (with only substantial evidence review by the court), while ensuring that the arbitrator would not reach an anomalous and incorrect legal decision which would not be subject to correction. By allowing the parties to agree to judicial review of the arbitral decision for legal error, the district court's order addressed the parties' concerns about predictability and adherence to the law, enabling them to utilize arbitration when they otherwise would have opted for full court adjudication.

The parties' priorities in this case are not unique. Particularly in complex commercial disputes, many parties may be reluctant to elect the efficiency benefits of arbitration over the guarantee of legal certainty and adherence to well-established legal principles which come from court adjudications. The FAA's policies strongly favoring arbitration are promoted—not undermined—if those parties are able to fashion arbitration procedures, including provisions allowing judicial review for legal error, to suit their individual needs.

Judicial efficiency also favors permitting parties to contract for judicial review of arbitration awards for legal error. Although it occasionally may require a more searching review than the limited grounds for vacatur under the FAA, review for only legal error certainly requires less judicial resources than full court adjudications. *See LaPine*, 130 F.3d at 891 (Kozinski, J., concurring) (so noting); *Bowen*, 254 F.3d at 936 n. 6 (same). That is particularly true for complex commercial disputes which involve multiple issues and parties, extensive discovery, and complicated facts and legal questions. By allowing courts to engage in the more limited review for legal error, judicial review provisions reduce the burden on the courts and allow courts to focus on legal issues, rather than factual disputes and issues. Such judicial review provisions also reduce the burden on the judiciary by increasing the number of parties willing to participate in arbitration, particularly in commercial disputes of monetary significance.

In short, the policy considerations uniformly cut in favor of enforcing arbitration agreements allowing judicial review for legal error. Enforcing such agreements will: (1) give effect to the contractual rights and expectations of the parties; (2) encourage arbitration by affording the parties flexibility and protection against legally erroneous awards; and (3) reduce the burden on the courts of plenary adjudication. Most importantly, giving effect to the judicial review provision in this case will further the central and pre-eminent policy of the FAA: to rigorously enforce arbitration agreements in accordance with their terms.

CONCLUSION

In this case, the parties clearly and unmistakably agreed to arbitrate a portion of the issues in their on-going federal court litigation with the condition that the district court would review the arbitration award for legal error. The district court expressly approved of the parties' arbitration agreement,

including the judicial review provisions. The FAA does not prevent enforcement of that stipulation because agreeing to judicial review of an arbitration award for legal error does not undermine the goals and policies of the statute and is consistent with the court's normal judicial functions.

For the reasons set forth above, this Court should reverse the decision of the Ninth Circuit and remand the case to the Ninth Circuit with instructions to enforce the judicial review provision in the parties' arbitration agreement.

Respectfully submitted,

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In The

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the parties to an arbitration agreement that provides that a court may confirm the award as a judgment can further empower that court to vacate or modify the award on grounds of legal or factual error, despite the Federal Arbitration Act's mandate that a court "must grant an order" confirming an award except on certain specified grounds that do not include legal or factual error.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Mattel, Inc. has no parent corporation and no publicly-held company owns 10% or more of Mattel, Inc.'s stock.

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INTRODUCTION AND STATEMENT OF THE CASE

This case arises out of a dispute over a lease agreement between petitioner Hall Street Associates, as owner of a tract of property in Oregon, and respondent Mattel, Inc., as a tenant of that property. Petitioner seeks to hold respondent liable for costs to clean up contamination caused by trichloroethylene (TCE), but it is undisputed that the contamination occurred before respondent ever used or leased the land and that respondent's activities did not result in any additional TCE contamination.

The parties ultimately agreed to arbitrate the issue and the arbitrator entered an award for respondent. The arbitrator found, based on two days of testimony and evidence, that the parties did not intend for respondent to become liable for environmental contamination that predated its lease term merely because it had failed to do certain tests of the well water as a tenant of the property (tests that the petitioner, as the property owner, also had failed to do).

Respondent sought confirmation of the arbitrator's award under the Federal Arbitration Act (FAA) in district court, but petitioner applied for vacatur or modification of the award. The district court, without the evidentiary record of the parties' intent before it, vacated the award and ruled that the lease language held respondent liable for the contamination that it did not cause. The court did so based on its view that there were errors of fact and law underlying the award, which are *not* included in the FAA as grounds for vacatur or modification, but were grounds agreed to by the parties consistent with then relevant circuit law. After a remand, the court ultimately entered judgment on an award modified to comply with its view of the law and facts.

The court of appeals twice reversed without reaching the merits and held, under intervening circuit precedent, that the district court lacked authority to vacate an

arbitration award based on an error of law or fact because those grounds exceed the grounds for vacatur set forth by Congress in the FAA. The court of appeals is correct and should be affirmed.

A. Statutory Framework

1. Congress enacted the FAA, 43 Stat. 883, in 1925 (codified in 1947 at 9 U.S.C. §§ 1 *et seq.*) in response to a national movement to make arbitration agreements enforceable. Prior to that time, the common law of many States was hostile to arbitration and provided that if parties agreed in a contract to arbitrate any controversies arising out of that contract, that arbitration provision was severable from the contract and revocable at any time prior to the issuance of an award by an arbitrator.

Some States, most prominently New York, had enacted legislation in the early 1920s to protect arbitration from such judicial hostility, but leading federal courts held that the New York arbitration statute did not govern actions in federal courts. *See, e.g., Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924). Thus, in 1925, Congress created a framework, through the FAA, for enforcement in federal court of arbitration awards.

2. Congress defined the basic statutory terms in Section 1 of the FAA and then, in Section 2, exercised its authority under the Commerce Clause to declare that "a written provision in * * * a contract evidencing a transaction involving commerce" that is an agreement to "settle by arbitration a controversy that thereafter arises out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of" such a contract or transaction, is "valid, irrevocable, and enforceable." The only grounds on which to revoke such an arbitration agreement are grounds that exist for the revocation of contracts generally. 9 U.S.C. § 2.

In Sections 3, 4, and 5, Congress provided the means for enforcement of arbitration agreements. It authorized federal courts, when they otherwise have jurisdiction over a case, to direct the parties to arbitrate cases in the manner agreed-to by the parties, to appoint arbitrators, and to stay pending federal litigation.[1] Section 7 empowers arbitrators to issue subpoenas, backed by the force of the district court.

Sections 9, 10, and 11—which are at the heart of the instant case—provide for judicial enforcement of an arbitration award. Section 9 permits a party to an arbitration agreement to seek, within one-year of the issuance of an arbitration award, an order from a court that confirms the award. Section 9 explicitly states that, if the arbitration agreement provides that a court judgment will be entered on an award made pursuant to the arbitration agreement, "the court *must* grant" an order confirming the award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (emphasis added.)

Section 10 authorizes a court to vacate an award, upon application of a party to the arbitration, on four discrete grounds. Section 11 authorizes a court to modify or correct an award, again upon application of a party, on three discrete grounds. Under Section 12, an application for such relief must be filed within three months of the filing or delivery of the award, and Section 13 provides that a court order confirming, modifying, or correcting an award is entered as a judgment of the court, which has the same force and effect as a judgment in a civil action. Section 16 of Title 9 of the United States Code, enacted in 1988, authorizes appeals from, *inter alia*, an order that

---

[1] Section 6 addresses the form for seeking such relief (an application, which is to be treated like a motion); Section 8 deals with the availability of certain interim remedies in admiralty cases.

confirms, vacates, modifies, or corrects an arbitration award.

B. Factual Background

1. From 1951 until 1967, Sawyers, Inc. was the owner of the property at issue here and operated a manufacturing facility at the site. Pet. App. 18a (¶ 4). In 1967, GAF Corporation acquired Sawyers and continued the manufacturing activities, which included the use of TCE to degrease metal parts in a building on the property. *Id.* at 18a (¶ 5), 26a (¶ 22). GAF/Sawyers also deposited sanitary wastes in a septic tank and on a drainfield, and dumped drums of degreaser onto the land. *Id.* at 26a (¶ 22). TCE was no longer used at the site after 1981. *Id.* at 26a (¶ 22), 42a.

In 1981, GAF/Sawyers sold a portion of the property to View-Master International Group, Inc. and View-Master Ideal Group (collectively, View-Master). *Id.* at 18a (¶ 7). View-Master owned the property outright until 1983, when it sold the land to Western International Properties, and leased back part of it to continue manufacturing operations at the site. *Id.* at 18a (¶ 9). Western International subdivided the property in 1984, selling the unencumbered portion to a commercial real estate development company and conveying the portion that View-Master was leasing to an individual. *Id.* at 18a (¶ 10), 41a. That individual transferred his ownership interest to Cascade Square Associates (Cascade) in 1985. *Ibid.*

View-Master continued as a tenant on the land and became a subsidiary of Tyco in 1989, when Tyco purchased its assets. *Id.* at 18a (¶ 11). Then, in 1997, respondent Mattel, Inc. acquired Tyco and assumed its rights and obligations as a tenant of the property. *Id.* at 18a (¶ 12).

The following year, Cascade Square Associates formed petitioner Hall Street Associates and transferred to it

ownership of the property, which included the privileges and duties of serving as landlord. *Id.* at 18a (¶ 13).

2. Cascade, as owner of the property and the property's well-water system from 1985 until 1998, did not test the well water for TCE as Oregon law requires. Br. in Opp. 3-4; Or. Rev. Stat. §§ 448.115 *et seq.* and implementing regulations. The tenants occupying the property, *i.e.*, View-Master, Tyco, and respondent, also did not test the well water for TCE. Pet. App. 26a (¶ 24).

In March 1998, petitioner had an environmental consultant evaluate the well water on its land, and the consultant discovered that the well water contained levels of TCE in excess of the federal maximum. *Id.* at 27a (¶ 25). Subsequent investigations followed, and the Oregon Department of Environmental Quality (DEQ) determined that other types of contaminants were also present on the property, and that the contamination extended beyond the well water, to the shallow soil, groundwater, and deep aquifer underlying the property. *Ibid.*

Respondent shut down the well immediately (less than one year after its tenancy began). *Id.* at 27a (¶ 26). A few months later, in November 1998, respondent and GAF/Sawyers entered into a consent order with DEQ. Under the agreement, GAF/Sawyers agreed to undertake environmental investigation of the property and respondent agreed to conduct public and employee outreach in regard to the environmental conditions. *Id.* at 43a.

3. In early 2000, respondent Mattel notified petitioner Hall Street that it intended to terminate the lease agreement. Pet. App. 18a (¶ 14). Respondent then spent more than $1 million on repairs and inspections, *id.* at 29a (¶ 40), and surrendered the property to petitioner in May 2001 in good condition and working order, consistent with the lease. *Ibid.*

Meanwhile, however, in March 2000, petitioner filed suit in Oregon state court for a declaratory judgment that respondent's termination of the lease was not permissible

and that, in any event, the lease obligated respondent to indemnify petitioner for costs related to environmental clean up and third-party lawsuits. *Id.* at 45a. Petitioner sold the property in 2004 with no showing of change to its value. Dt. Ct. Dkt. No. 164, Exh. B (July 25, 2005).

a. The lease in effect between petitioner and respondent had been entered into by petitioner's principal, Cascade Square Associates, and respondent's predecessor, then-tenant View-Master. Pet. App. 19a (¶ 16). The lease required, *inter alia*, that the tenant assume liability "for the use or presence in the Building materials or on or about the Premises of any hazardous waste" and responsibility for investigation and cleanup of "any such release or presence or use." J.A. 86 (§ 12(b)). The lease provided that the tenant would "indemnify and defend Landlord" for "all losses, costs, damages, expenses (including environmental abatement costs[)] or liabilities directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials." J.A. 86 (*quoting* § 12(b)); *see also* Dt. Ct. Dkt. No. 101, at 3 n.4 (Feb. 4, 2003) (the indemnity specified in Section 12 covers "hazardous Building materials").

The lease included an *exception* to the tenant's obligation to indemnify the landlord under Section 12 as follows:

> *To the extent Tenant has been in compliance with applicable environmental laws* then, notwithstanding the foregoing language in Section 12.b. above, Tenant shall *not* be held liable following the expiration of this Lease term for the following:
>
> * * *
>
> (iii) the removal and disposal of any hazardous waste on the Premises, the presence or use of which hazardous waste has not been caused directly or indirectly by the acts of the Tenant * * *.

J.A. 87 (§ 12(c)) (emphasis added).

The lease also included an indemnification clause that stated, in relevant part, that the tenant would "defend and indemnify" the landlord for "all liability, damages, costs, or expenses" that arose "from any act, omission, or negligence" of the tenant or its "officers, contractors, licensees, agents, servants, employees, guests, invitees, predecessors-in-interest, or visitors in or about the Building or Premises." J.A. 88 (§ 13(a)). That Section applied to an act, omission or negligence "whether occurring in the construction of or choice of building materials for the building, occurring during or prior to the original Lease, during this Lease, relating to discharging hazardous materials, or arising from any breach or default under this Lease by Tenant." *Ibid.*

The section also had an exception to the indemnification clause that stated, *inter alia*, that, "[t]o the extent Tenant has been in compliance with applicable environmental laws then" the tenant "shall not be held liable following the expiration of this Lease term" for various specific costs related to hazardous waste removal and disposal, and "[a]ny other liability, damage, cost, or expense which has not been caused directly or indirectly by the acts of Tenant." J.A. 89 (§ 13(a)), 90 (§ 13(a)(iv)).

Various other provisions of the lease reflected the parties' intent that respondent not be responsible for damages caused by others. For example, Section 13 specified that there would be no indemnity to the extent the damages were caused by the intentional or negligent acts of the landlord. J.A. 91 (§ 13). Section 13 further specified that, in the event of litigation against the landlord over failure to comply with environmental laws over a period of time, other tenants would pay their "prorated amounts" of the landlord's defense costs. It stated that respondent's obligation to defend would be "limited to its allocable portion of such defense costs." J.A. 88-89 (§ 13). The lease also stated that the parties would attempt to negotiate allocation of defense costs based on respondent's "actual contribution to the damages which

are the subject of such suit." J.A. 89 (§ 13). Also, the lease provided that when respondent ceased to be the tenant, it was required to surrender the premises to petitioner "in as good condition as when received by View-Master" from petitioner under the original lease "or as thereafter improved, reasonable use, wear and tear excepted," without any responsibility for conditions that preexisted that lease. J.A. 100 (§ 20).

4. Respondent removed petitioner's lawsuit to the United States District Court for the District of Oregon based on diversity of citizenship, J.A. 1, and the case proceeded to a bench trial on the question whether respondent was entitled to terminate the lease. Pet. App. 18a-19a. The court ruled in respondent's favor on that question and ordered the parties to mediation, but mediation failed. J.A. 45; Br. in Opp. 4.

C. Proceedings Below

1. The original arbitration award in respondent's favor

In October 2001, petitioner and respondent entered into an agreement to arbitrate the remaining issues in the case, in the form of a stipulation and incorporated rules for the arbitration. Pet. App. 4a-16a; *see* 9 U.S.C. § 2 (FAA extends to agreement to arbitrate an existing controversy). The agreement provided that the parties would submit the arbitrator's decision to the district court "for the confirmation of the decision as a judgment of such court." Pet. App. 15a (¶ 24). The agreement further stated that the district court "may enter judgment upon any award, either by confirming the award or by vacating, modifying, or correcting the award." *Id.* at 16a (¶ 27). The agreement purported to require, consistent with then-governing circuit precedent, that "[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii)

where the arbitrator's conclusions of law are erroneous." *Ibid.*[2]

The arbitration commenced on December 12, 2001, and continued for two days. J.A. 48. The arbitrator accepted testimony, heard argument, received documentary evidence, reviewed briefing, and visited the site. Br. in Opp. 4.

On January 2, 2002, the arbitrator rendered a decision in favor of respondent. Pet. App. 17a-38a. Parsing through awkwardly phrased provisions of the lease, the arbitrator correctly found, *inter alia*, that the lease unambiguously did not impose a duty on respondent to indemnify petitioner for costs related to GAF/Sawyer's use of TCE that contaminated the well water. The arbitrator noted that respondent, View-Master, and Tyco had not used TCE on the property and had not engaged in any activities that had resulted in additional TCE contamination. *Id.* at 35a (¶ 5). The arbitrator ruled that their failure to test for TCE contamination did not

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[2] The parties' provision regarding grounds for vacatur, modification, and correction was listed as one of more than two dozen provisions in the agreement and, contrary to petitioner's claim (Pet. Br. 4-5, 39), the affidavit submitted by petitioner to the district court, J.A. 52 (¶ 4), does *not* aver that the "parties would have bypassed arbitration if judicial review for legal error had been unavailable under Ninth Circuit precedent at the time." Indeed, the court of appeals determined, as part of its severability ruling, that the evidence did *not* establish "that the parties intended that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed." Pet. App. 115a. Petitioner attempted to rely on that same affidavit in its brief on appeal and its petition for rehearing challenging the panel's severability ruling. *See* Pet. C.A. (No. 03-35525) Br. 28-29; Pet. C.A. (No. 03-35525) Pet. for Reh'g 4, 11. That petition was denied, *see* J.A. 17, and petitioner did not raise the fact-bound severability holding in its petition for *certiorari*.

constitute a violation of "applicable environmental laws" within the meaning of the lease. *Id.* at 35a (¶ 5).[3]

2. The district court's remand based on its view that the arbitrator made a legal error and engaged in inadequate factfinding

Respondent sought confirmation of the arbitration award in district court on January 29, 2002. J.A. 51 (¶ 1). Petitioner responded with a motion to vacate, modify, or correct the award on February 13, 2002, contending, *inter alia*, that the arbitrator erred in concluding that respondent had remained in compliance with "applicable environmental laws" as required by the lease. Pet. App. 47a.

Respondent opposed petitioner's motion on the merits on the ground that the arbitrator was correct as to the parties' intent regarding the phrase "applicable environmental laws," which meant environmental laws with which the tenant was obliged to comply in order to protect petitioner's property from damage caused by the tenant's release of hazardous waste, use of hazardous building materials, or other such activities. Dt. Ct. Dkt. No. 73, at 21-22 (Feb. 25, 2002). Respondent also argued that there was no evidence that respondent's purported failure to comply with applicable environmental laws had caused any harm to petitioner or third parties, and there was no evidence that the value of the property was diminished during the course of the lease. *Id.* at 24-25.

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[3] The arbitrator concluded that respondent was the "prevailing party" and was entitled to attorneys' fees, costs and expenses pursuant to the lease. *Id.* at 38a, 45a. In a separate ruling on January 29, 2002, the arbitrator awarded respondent fees and costs in the amount of $441,545.58. *Id.* at 45a, 47a; Dt. Ct. Dkt. No. 68, at 2 (Jan. 29, 2002).

The district court vacated the arbitrator's decision and award on April 29, 2002. Pet. App. 39a-58a. The court did not approach the arbitrator's decision as a typical case under the FAA. *Id.* at 46a. Rather, the court invoked the grounds for vacatur created by the parties' arbitration agreement, and reviewed the award for legal error and for substantial evidence supporting the facts. *Ibid.* (citing *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997)).

The district court found legal error in the arbitrator's determination that respondent was in compliance with "applicable environmental laws," and therefore not liable to petitioner for environmental clean up costs. *Id.* at 51a-56a. Petitioner had not, however, provided the district court with the arbitration record. *See* Dt. Ct. Dkt. No. 138, at 119-121 (Aug. 20, 2002). Therefore, the district court did not have before it the evidence relevant to whether the lease terms were ambiguous or the intent of the parties to the contract, despite the relevance of such evidence under state law. *See* note 13, *infra*. The court nonetheless rejected the arbitrator's finding and ruled that "the arbitrator erred as a matter of law" and that the parties must have meant any environmental law whatsoever that applied to a tenant of the property, regardless of whether the law was supposed to protect against a tenant's conduct that might cause property damage. Pet. App. 53a-56a. The court remanded the case to the arbitrator for further consideration in light of its ruling. *Id.* at 56a. The court also remanded for the district court to "fully develop the factual record" on another issue. *Id.* at 57a.

3. The revised arbitration award in petitioner's favor to conform to the district court's legal and factual rulings

The arbitrator reversed its liability determination based on the legal ruling in the remand order from the district court, and held respondent legally liable. *Id.* at

81a. Because petitioner had not demonstrated that current or future remediation was necessary, however, and had not established any future damages, the arbitrator awarded only "nominal damages," *id.* at 82a, and the vast bulk of the $583,971.60 award was composed of attorneys' fees and costs. *Id.* at 84a-85a. The arbitrator also awarded a declaratory judgment for future costs.

4. The district court's modification and confirmation of the revised arbitration award

The district court confirmed the revised award in part and modified it in part. *Id.* at 86a-110a. The court again applied the "standard of review" that "the parties drafted" in their agreement. *Id.* at 89a. In relevant part, the district court confirmed the arbitrator's award that now found that the indemnification exception for compliance with "applicable environmental laws" did not apply in light of the district court's earlier legal construction of that term. The court ruled that respondent's contrary arguments regarding various limitations in the lease language were "foreclose[d]" by the court's own earlier remand order and found that the arbitrator's conclusion was now in accord with that order. *Id.* at 105a-106a. The court modified aspects of the award regarding the interest on the award. *Id.* at 95a-96a.[4]

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[4] The district court ordered respondent to pay petitioner $484,031.12 in past costs and damages, $252,065.32 in attorneys' fees, and $74,011.05 in costs and expenses (plus certain pre- and post-judgment interest). *Id.* at 110a. The district court entered a declaratory judgment against respondent for all future costs petitioner may be required to pay to DEQ, or to expend as a result of a DEQ order relating to the environmental clean up of the property. *Id.* at 113a.

5. The court of appeals' reversal and remand for confirmation of the initial arbitration award under the FAA unless prevented by statutory grounds

The court of appeals affirmed in part, reversed in part, and remanded the case. Pet. App. 114a-116a. The court held that the provision in the arbitration agreement purporting to "control[] the mode of judicial review" was unenforceable under its intervening *en banc* precedent of *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) ("Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision" under the Federal Arbitration Act and "private parties may not contractually impose their own standard on the courts"), *cert. pet. dismissed*, 540 U.S. 1098 (2004). Pet. App. 115a-116a & n.3. The court also ruled that the provision was severable from the remainder of the arbitration agreement. *Ibid.* The court therefore reversed and directed the district court on remand to confirm the original award "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." *Id.* at 115a-116a. Also, the court affirmed the district court's decision after the bench trial that respondent had not breached the lease through its termination of its tenancy. *Id.* at 116a. Petitioner's petition for rehearing *en banc* seeking review of, *inter alia*, the severability determination was denied. J.A. 17.

6. The district court's second vacatur of the original arbitration award and second entry of a modified arbitration award in petitioner's favor

On remand, the district court still did not confirm the award. Instead, it ruled that an arbitrator's award can be vacated under the FAA if it is based on an "implausible interpretation" of a contract. Pet. App. 124a. The court then held that the arbitrator's interpretation of "applicable environmental laws" was "implausible." *Ibid.* The district court again vacated the original arbitration award and again entered judgment in accordance with its earlier opinion that had been reversed by the court of appeals. Pet. App. 127a-128a.

7. The court of appeals' second reversal of the district court

The court of appeals again reversed the district court's judgment. Pet. App. 131a-134a. The court held that "[i]mplausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. §§ 10 or 11." *Id.* at 132a. The court ruled that the arbitrator's decision in this case was not "'completely irrational'" and did not support vacatur under Section 10(a)(4), "the only subsection of either 9 U.S.C. §§ 10 or 11 that could conceivably apply to the arbitration award in this case." *Id.* at 133a (*quoting Kyocera*, 341 F.3d at 997).

The court directed the district court "to enforce the original arbitration award and declare [respondent] Mattel the prevailing party." *Id.* at 133a. One member of the panel dissented, agreeing with the majority's identification of the governing legal standard, but viewing the arbitrator's interpretation as "completely irrational." *Id.* at 133a-134a.

A petition for rehearing *en banc* by petitioner was denied on October 17, 2006. *Id.* at 137a-138a.[5] This Court granted the petition for a writ of *certiorari* on May 29, 2007.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the grounds set forth in Sections 10 and 11 of the FAA are the exclusive grounds on which a court may deny an application to confirm an arbitration award and vacate, modify, or correct the award.

A. Section 9 of the FAA unequivocally directs that a court "*must* grant" an application for an order confirming an arbitration award, unless "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (emphasis added). It is undisputed that Sections 10 and 11 establish only certain specified grounds and do not authorize a court to vacate, modify, or correct an award based merely on an error of law or fact. That is consistent with the limited role of the court under the FAA, which is to enter an arbitration award as an enforceable judgment of the court, not to review the merits of the award.

Section 9 is not a default standard as petitioner would have it, subject to the parties' alteration. The text of Section 9 makes clear that it is a mandate for confirmation of the award subject only to Sections 10 and 11. Elsewhere in the statute, Congress established default rules on other

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[5] The court of appeals' mandate issued on December 21, 2006, and the district court entered judgment for respondent on February 26, 2007. Petitioner filed an appeal of that judgment, but informed the court of appeals that it will dismiss that appeal if this Court affirms the court of appeals' judgment in this case. Pet. C.A. (No. 07-35257) Reply to Resp. Opp. to Mot. to Stay Appellate Proceedings, at 2-3 (July 3, 2007). The court of appeals stayed briefing in that appeal pending the outcome of this proceeding. C.A. (No. 07-35257) Order (Aug. 21, 2007).

issues that allow the parties to an arbitration agreement to adopt a provision different from the default rule. Congress did not do so with respect to the grounds for judicial denial of an application for confirmation of an award.

Petitioner is wrong that this Court "implicitly recognized" judicially created exceptions to the confirmation of awards in *Wilko v. Swan*, 346 U.S. 427 (1953). Rather, the Court's reference in that case, in *dicta*, to "manifest disregard" goes to the scope of the statutory grounds in Section 10, and did not establish a nonstatutory ground for vacatur, as petitioner urges in this case.

Section 2 of the statute also demonstrates that Sections 9, 10 and 11 are not mere default rules. Section 2 makes the FAA applicable to agreements to "settle" a controversy "by arbitration." But if the parties to an arbitration agreement can agree that a court will refuse to confirm an award if the award contains an error of law or lacks substantial evidence supporting facts, then arbitration becomes only a prelude to judicial review and there is no agreement that the arbitration will "settle" the controversy.

The FAA's limited grounds for vacatur, modification, or correction of an award reflect a deliberate choice made by Congress in 1925 to reject an alternative approach of certain contemporaneous arbitration laws in some States, in particular Illinois, that permitted vacatur of arbitration awards for legal error. Congress followed, instead, the New York Arbitration Act of 1920, which had been uniformly interpreted not to permit review of an arbitrator's conclusions of law or findings of fact.

Because petitioner has neither text, structure, nor history on its side, it repeatedly attempts to find support in two cases of this Court, *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), but neither

provides the governing framework for this case. *Volt* relied on principles of federal preemption and looked to the text of Section 4, neither of which are relevant here. *First Options* applied the general rule that parties can agree to have any controversy, including a controversy about the scope of arbitration, settled by an arbitrator, which is also not at issue here.

B. Petitioner, to the extent it addresses the text of the statute at all, focuses on the provision that makes judicial confirmation of an award under Section 9 available only where the parties agreed to have a judgment of the court entered on the award. But that provision is to distinguish an arbitration award that can be enforced through the expedited procedures of the FAA, from an award that is enforceable only through a more laborious common law contract action because there was not an agreement for entry of a court judgment on the award.

Petitioner's view is that parties to an arbitration agreement can redefine the federal cause of action under Section 9 for confirmation of an arbitration award to include whatever supplemental elements they like. That is contrary to well-settled law that courts are not bound by the parties' stipulations as to what federal law is. Furthermore, it is well established that, in a standard civil action, a court is not bound by the parties' agreements about how a court will exercise its equity power. Yet under petitioner's view, a court would be bound by the grounds drafted by the parties for confirmation, vacatur, modification, or correction, rather than by the grounds stated by Congress.

Petitioner attempts to limit its argument to judicial review that is consistent with a "normal judicial function," but that only highlights the lack of any meaningful stopping point in its argument. There are a multitude of standards that parties could agree to have a court apply to their arbitration award, including *de novo* review, which certainly would render arbitration a mere dress rehearsal

for full-scale court litigation in contravention of the purpose of the FAA. Moreover, parties also could presumably set whatever standard they chose for *appellate* review of the district court's decision, even in this Court. The logic of petitioner's proposal would also allow parties to *override* the statutory vacatur grounds and agree to require confirmation of an award by a court notwithstanding the existence of grounds set forth in Sections 10 or 11.

Petitioner's analogy to judicial review of a ruling by a magistrate judge, special master, or bankruptcy judge reveals the constitutional doubts raised by petitioner's argument. The fact that Article III judges have authority over magistrate judges was critical to this Court's holding that Congress can delegate certain functions to magistrate judges. Federal judges have similar authority over special masters and bankruptcy judges, but not so for arbitrators.

C. Selection by parties of nonstatutory grounds for judicial vacatur, modification, and correction of arbitration awards based on errors of law or fact is contrary to the core purposes of the FAA and would create havoc for arbitrators and courts alike. It would almost certainly mean that arbitrations would become like court proceedings, with adoption of explicit limits on the scope of the record, rulings on evidentiary objections, and formal findings. That would seriously undermine the time and cost savings that arbitration is supposed to yield. Or, if arbitration proceedings remained informal and less structured, courts would be thrown into the disconcerting role of conducting review for factual error where rules of evidence do not govern, for legal error where legal rulings are based on such records, and reviewing awards with no requirement for a detailed written rationale. In either event, inevitable questions will arise including, for example, what to do about harmless error on judicial review and collateral disputes regarding whether an issue constitutes a question of law, of fact, or a mixed question.

Parties can protect themselves against the risk of an anomalous decision by an arbitrator through appellate

arbitration, which is widely available through the leading arbitration associations. Appellate arbitration services allow parties to provide for a second review by arbitrators of an award under whatever standards the parties wish. What parties cannot do is require a court to apply standards of review and grounds for judicial vacatur, modification, or correction of an arbitration award that the parties customize for their particular cause of action in court, but which Congress, in the FAA, did not authorize.

ARGUMENT

THE FEDERAL ARBITRATION ACT REQUIRES THAT A COURT CONFIRM AN ARBITRATION AWARD UNLESS THE AWARD IS VACATED, MODIFIED, OR CORRECTED ON ONE OF THE SPECIFIED STATUTORY GROUNDS, AND PRIVATE PARTIES CANNOT AGREE TO NONSTATUTORY GROUNDS THAT BIND THE COURT

Section 9 of the FAA unequivocally establishes that a court must grant an application to confirm an arbitration award unless the award is vacated, modified, or corrected on grounds delineated in Sections 10 and 11 of the statute. Petitioner would replace this framework that Congress carefully crafted with a confusing pastiche of standards of review that are limited only by the imagination of the parties.

A. The Text, Structure, And History Of The FAA Demonstrate That Sections 10 And 11 Provide The Exclusive Grounds Upon Which A Court Can Deny An Application To Confirm An Arbitration Award Under Section 9

The text and overall structure of the FAA demonstrate that Congress did not authorize parties to agree to nonstatutory grounds, including review for legal or factual error, for a court's denial of an application to confirm an arbitration award.

1. The only grounds allowed under Section 9 for denial of an application to confirm an award are those listed in Sections 10 and 11, which do not include mere error of fact or law

a. Section 9 imposes a duty on a court to grant an application to confirm an arbitration award if the parties agreed in the arbitration agreement to have a court enter judgment on an award. Congress stated that "the court *must* grant" the application except in one situation, *i.e.*, where "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (emphasis added).

The only grounds in Sections 10 and 11 on which a court is authorized to vacate, modify or correct an award are as follows. Judicial vacatur of an arbitration award under Section 10 is authorized:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, * * * or in refusing to hear evidence, * * * or any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4).

Judicial modification or correction of an arbitration award under Section 11 of the FAA is also authorized only on limited grounds:

> (a) Where there was an evident material miscalculation of figures or an evident material

> mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11(a)-(c).

It is difficult to imagine how Congress could have been any clearer. The detailed circumstances listed in Sections 10 and 11 identify the instances in which a court is authorized to deny an application to confirm an arbitration award under Section 9. In all other circumstances, the court "must" grant an order of confirmation. That is consistent with the limited role of the court under the FAA, which is to enter an arbitration award as an enforceable judgment of the court, not to review the merits of the award. It is undisputed that Congress did not include an arbitrator's error of law or lack of substantial evidence to support facts as grounds on which a court can deny an application to confirm under Section 9 or can vacate, modify, or correct an arbitration award under Sections 10 or 11.

b. Despite this patently clear statute, petitioner contends that Congress meant for the grounds listed in the statute for denial of an application to confirm an award to be only "default" rules that the parties to an arbitration agreement can alter. But Section 9 is not a default standard subject to such alteration.

First, the language in Section 9 that specifies that any denial of confirmation must be "as prescribed in sections 10 and 11 of this title," would have no meaning if Congress had intended to create only a default rule and to permit parties to select other grounds, not identified in Sections 10 and 11, for denial of confirmation of an award. And petitioner's interpretation gives that language no

meaning, contrary to the ordinary rule of statutory construction that every word in a statute must be construed to have meaning. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "). The only possible meaning of the phrase "as prescribed in sections 10 and 11" is to establish that the grounds for vacatur, modification, or correction of an award in Sections 10 and 11 are the exclusive grounds on which a court may rely to deny an application to confirm an award.

Second, in Section 5 and in another provision of Section 9, Congress expressly established default rules on other issues that allow the parties to an arbitration agreement to adopt a provision different from the default rule. *See* 9 U.S.C. § 5 (default rule that court should designate and appoint single arbitrator, but parties may provide for a different method of appointment and for more than one arbitrator); *id.* at § 9 (default rule that application to confirm award is to be made in federal court where award was made, but parties may specify another court). By contrast, in Section 9's provision for denial of an application to confirm an award, Congress designated only the grounds prescribed in Sections 10 and 11 without any allowance for that to be trumped by the parties' choice of different grounds. Thus, Congress knew how to create a default rule in the FAA and did so in more than one instance, but did *not* do so with regard to the grounds for denial of an application to confirm an award. *See Andrews*, 534 U.S. at 28 (relying on general maxim "*expressio unius est exclusio alterius*" to determine that "Congress implicitly excluded a general discovery rule by explicitly including a more limited one"); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) ("explicit listing of exceptions" to running of limitations period demonstrates Congress's intent to preclude "courts [from] read[ing] other unmentioned, open-ended, 'equitable' exceptions into the

statute"); *The Raleigh & Gaston R.R. Co. v. Reid*, 13 Wall. 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

c. Petitioner is wrong that this Court has "implicitly recognized" (Pet. Br. 24) that the grounds listed by Congress in Sections 10 and 11 are not exclusive grounds for vacatur, modification, or correction of an award. The only case under the FAA cited by petitioner is *Wilko v. Swan*, 346 U.S. 427 (1953), which contained a negatively phrased clause that has been read by some to mean that an arbitration award can be vacated if the arbitrator acted in "manifest disregard" of the law. *See* 346 U.S. at 436-437 ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."). That statement, however, was not necessary to the case's holding in *Wilko*, which in any event was itself overruled in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Moreover, to the extent *Wilko* could be read to suggest that "manifest disregard" is a ground for vacatur of an arbitration award under the FAA, Justice Douglas's opinion for the Court also suggested that it was a ground for vacatur encompassed within Section 10 itself. Just two sentences before its mention of "manifest disregard," the opinion stated that the "[p]ower to vacate an award is limited," and quoted the entire text of Section 10. *See* 346 U.S. at 436 & n.22; *cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656-657 (1985) (Stevens, J., dissenting) (summarizing collectively the grounds for vacatur under section 10 as "manifest disregard"). This is the conclusion of the better reasoned court of appeals' decisions. *See, e.g., Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960); *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1973); *Kyocera Corp. v. Prudential-Bache*

Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (en banc), *cert. pet. dismissed*, 540 U.S. 1098 (2004).

Petitioner expressly acknowledges that the review it seeks for legal error "differs from the vacatur standards set forth in sections [sic] 10" of the FAA. Pet. Br. 28. Thus, petitioner's argument is not governed by the *Wilko* Court's view of the scope of Section 10 in any event. Indeed, in *Wilko*, itself, the Court held that the FAA "contains no provision for judicial determination of legal issues" resolved by the arbitrator, 346 U.S. at 437, which is what petitioner now urges. *See also id.* at 439 (Jackson, J., concurring) (noting that the majority had "decide[d] that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute"). The Court expressly contrasted the FAA system to the British system, which allowed for judicial review of legal questions under the then-governing English Arbitration Act of 1889, 52 & 53 Vict., c. 49. *See* 346 U.S. at 437 & n.25.

Petitioner's reliance on *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), to claim that this Court has recognized a public policy exception to Section 9 of the FAA is also misplaced because that case did not involve the FAA. It dealt with the enforcement of arbitration awards made pursuant to collective bargaining agreements. As explained by the Court in the *Steelworkers' Trilogy*, that body of arbitration case law is rooted in federal common law and not an arbitration-specific statute. *See United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). It thus does not bear on the correct interpretation of the FAA.[6]

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[6] Petitioner's citation (Pet. Br. 35 n.7) to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is unavailing because the statute in

(Continued on following page)

Furthermore, even in the collective bargaining context, this Court has recognized that a court may refuse to enforce an arbitration award based on "public policy" only when the award itself conflicts with the "explicit," "well defined," and "dominant" policies of a different federal statute, and not the "general considerations of supposed public interests." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62-63 (2000) (internal quotation marks omitted). Petitioner argues as if its interests are equivalent to the legislative acts of a sovereign that this Court must reconcile with the text of the statute. It is mistaken. This Court's cases bring into harmony various acts of Congress; they do not license a court's disregard of the requirements of one statute at the desire of the parties to an arbitration agreement.

2. Section 2 makes the FAA applicable to agreements to "settle" a controversy "by arbitration," which is negated by petitioner's interpretation

Section 2 of the FAA, which is the lynchpin of the statute, also demonstrates that Sections 9, 10 and 11 are not mere default rules that allow parties to agree to wholesale reconsideration by courts.

Section 2 makes the FAA applicable to agreements to "settle" a controversy "by arbitration." 9 U.S.C. § 2. Under Section 2, in order to constitute an "arbitration," the parties must give a third party the authority to "issue a binding award based on [its] determination." 1 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 2.3.2, at 2:23 (1994).

Indeed, the authority to settle a controversy through a final determination of the controversy is what

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that case, ERISA, did not identify the standard of judicial review for decisions by benefit plans and, instead, left it to the Court to create a federal common law standard.

distinguished arbitration under the New York Arbitration Act of 1920 (the model for the FAA, as we discuss below) from other forms of third-party referrals. *See Petition of American Ins. Co.*, 203 N.Y.S. 206, 207 (N.Y. App. Div. 1924) (contrasting an arbitration, which is "the submission of all the matters that are in controversy between the parties for final determination upon the whole issue," and a decision "which is not conclusive as to the ultimate rights of the parties"); *In re Fletcher*, 143 N.E. 248, 251 (N.Y. 1924) (proceeding is not an arbitration when the "so-called award" would not "settle the ultimate rights of the parties"); S. David Stutson, Note, *Contracts: Agreements for Appraisals and Arbitrations: New York Arbitration Law*, 8 Cornell L. Q. 53, 54 (1922).

But arbitrators are denied the authority to settle a controversy if the parties agree that a court must review the law and facts on which the award is based and cannot grant an application to confirm the award if it finds any error. In such circumstances, the arbitration "settles" nothing and fails to constitute a final determination. Instead, the arbitration becomes a mere dress rehearsal for litigation.

Arbitration settles a controversy only if the framework crafted by Congress is given full effect and a court is required to grant an application to confirm an arbitration award except on the limited grounds prescribed in Sections 10 and 11. In such circumstances, the court's role is properly limited to reduction of the award to a judgment. Indeed, one of the grounds in Section 10 for vacatur of an arbitration award is if the arbitrators did not make a "final, and definite award upon the subject matter submitted." 9 U.S.C. § 10(a)(4).

3. The FAA reflects a deliberate choice by Congress to reject the alternative approach of some of the contemporaneous arbitration laws that permitted vacatur of arbitration awards for legal error

By the time Congress enacted the FAA, Illinois and at least five other States had enacted arbitration laws that expressly permitted a court to review an arbitration award for legal error. Congress deliberately rejected that approach in the FAA. The FAA was based, instead, on the New York Arbitration Act of 1920, which did not allow such review and was understood at the time to be the antithesis of the Illinois arbitration law.

a. Starting at around the time of World War I, legal reformers urged state and federal governments to modernize their arbitration statutes. *See generally* Ian R. Macneil, *American Arbitration Law—Reformation, Nationalization, Internationalization* (1992). A split developed in the movement, however, over several substantive points. The primary dispute was whether parties would be bound to an agreement to arbitrate that was made prior to the existence of a controversy between the parties. That question was the primary focus of the modernizers' national debates. *See id.* at 29-47.

But another issue that divided the modernization movement was the grounds on which a court could rely to confirm or vacate an arbitration award. Illinois and New York took opposite positions on this issue and became two poles around which the debate formed. The two States were considered leaders in the area because they contained the country's major commercial centers, and they both enacted arbitration statutes during this period before Congress's enactment of the FAA.

b. The judicial review petitioner seeks in the instant case is akin to the judicial review of legal issues permitted under the Illinois statute. *See* Laws of Ill. 1917, ch. 202, *reprinted in* Note, *Arbitration in the United States*, 2 J.

Am. Judicature Soc. 53, 55-57 (1918-1919). The Illinois Arbitration Act of 1917 contained express mechanisms by which the parties could obtain *de novo* judicial review of legal rulings in arbitration awards. These provisions, akin to those then in effect in England, were intended, according to the statute's supporters, to rely on the "superior" factfinding of arbitrators, while questions of law were "expertly disposed of" by the courts. *Id.* at 55. Section 6 of the Illinois Arbitration Act authorized the arbitrators—at their discretion or at the "request of a party"—to "state their final award * * * in the form of a conclusion of fact for the opinion of the court on the questions of law" or "at any stage of the proceedings [to] submit any question of law arising" from the controversy "for the opinion of the court stating the facts upon which the question arises." *Id.* at 55-56 (reprinting § 6(a) & (b)). In turn, the statute authorized the court to set aside the award if "any legal defects shall appear in the award of such proceedings, or if it shall appear that the award is not sustainable under the opinions of the court upon questions of law under section 6 of this act." *Id.* at 56 (reprinting § 11).

By the time Congress enacted the FAA in 1925, at least three other States (Massachusetts, Nevada and Utah) had adopted provisions similar to the Illinois Act. *See* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* 505-506 (1930). In addition, at least another two States (Nebraska and Washington) had express provisions in their statutes that authorized courts to set aside an arbitration award if the award was based on an error of law or fact. *See id.* at 506, 857.

By contrast, the New York Arbitration Act of 1920, which contained language virtually identical to what is now Sections 9, 10, and 11 of the FAA, did not permit a court to set aside an award based on an arbitrator's legal

error.[7] Julius Cohen—who was the principal drafter and leading proponent of both the New York Act and the FAA, *see Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Senate and House Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10, 19 (1924)—explained that New York had rejected an earlier draft of the statute that would have followed the Illinois Arbitration Act with regard to judicial review of questions of law. *See* 34 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 97 (1924).

At the time Congress enacted the FAA, the New York courts, interpreting the 1920 New York Arbitration Act and its predecessors, had "uniformly held that any finding of fact or conclusion of law of an arbitrator will not be reviewed." *C. Itoh & Co. v. Boyer Oil Co.*, 191 N.Y.S. 290, 292 (N.Y. App. Div. 1921); *accord A.O. Andersen Trading Co. v. Brimberg*, 197 N.Y.S. 289, 290 (N.Y. Sup. Ct. 1922) (claims that arbitrator "misconstrued the agreement out of which the controversy arose, and applied the wrong measure of damages * * * are not open for consideration at this time, as the award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts"). This was because the New York Arbitration Act "state[s] the grounds on which an arbitration award may be vacated or modified," which did not include errors of law or fact, and "[a]wards should not be impeached, except

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[7] Section 8 of the New York Arbitration Act of 1920 provided that Sections 2365-2386 of the New York Code of Civil Procedure would apply to arbitration agreements. *See* N.Y. Act of Apr. 19, 1920, ch. 275. Sections 2374 and 2375 of the Code of Civil Procedure were the source for Sections 10 and 11 of the FAA; Sections 2366 and 2373, combined, were the source for Section 9 of the FAA. All those sections of state law were shortly thereafter recodified, without amendment, as Sections 1419, 1420, 1411, and 1418, respectively, of the New York Civil Practice Act of 1920, ch. 925. The next year, these state provisions were again renumbered as Section 1456, 1457, 1458, 1449 of the Civil Practice Act. *See* N.Y. Act of 1921, ch. 199, § 14.

upon substantial grounds and for the reasons specified in the law." *Itoh*, 191 N.Y.S. at 292, 293; *see also Everett v. Brown*, 198 N.Y.S. 462, 465 (N.Y. Sup. Ct. 1923) (discussing language later used by Congress in Section 9 of the FAA and holding that the New York Arbitration Act provided "that the court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected, as prescribed in the next two sections. * * * [This provision] relating to the confirmation of an award [is] mandatory, and leave[s] no discretion to the court. It prescribes that the court must confirm the award, unless such award has been vacated, modified or corrected").[8]

The New York courts emphasized that if judicial review of an arbitrator's legal or factual determinations were available, "the award, instead of being the end of the litigation, would simply be a useless step in its progress." *Itoh*, 191 N.Y.S. at 292 (*quoting Sweet v. Morrison*, 22 N.E. 276, 280 (N.Y. 1889)); *see Everett*, 198 N.Y.S. at 465 (if the "proper court would still have to pass upon and decide the law and the facts as if no award had been made," then that

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[8] Earlier decisions in other States similarly held that statutory grounds for vacatur of an arbitration award were the exclusive grounds on which a court could rely to deny an application to confirm an award. *See, e.g, Phelps v. Donovan*, 75 N.W. 94, 94 (Mich. 1898) ("The award is conclusive, and the court can only refuse to enter judgment confirming it for one of the reasons specified in the statute."); *Carsley v. Lindsay*, 14 Cal. 390, 394 (Cal. 1859) ("An impeachment on this ground [that the award is contrary to law and evidence] was not admissible at common law, and, if it were, our statute (Practice Act, 385, et seq.), prescribes *other* grounds, as those upon which alone the award can be vacated by the District Court upon motion."); *Reeves v. McGlochlin*, 65 Mo. App. 537 (Mo. Ct. App. 1896) ("The award can only be vacated or modified for reasons set out in the statute (sections 405, 406) and the defendant's motion did not include any of these."); *Hackney v. Adam*, 127 N.W. 519, 521 (N.D. 1910) ("It was not error to deny such motion" to vacate an arbitration award because "appellant did not bring himself within any of the statutory grounds enumerated in section 7699, Rev. Codes 1905, for the vacation of an award.").

"would operate to defeat the object of the [arbitration] proceeding").

Congress drew the text of the FAA directly from the New York Arbitration Act. *See* S. Rep. No. 68-536, at 3 (1924); *1924 Hearing*, *supra*, at 10 (statement of W.H.H. Piatt, Chairman of the American Bar Association Comm. on Commerce, Trade and Commercial Law); *id.* at 16 (statement of Julius Cohen, member of the Comm. on Commerce, Trade and Commercial Law); *id.* at 19 (statement of Francis B. James); *id.* at 21 (statement of Herbert Hoover, Secretary of Commerce); *id.* at 25 (statement of Alexander Rose, representing Arbitration Society of America); *id.* at 34 (Julius Cohen). Congress was informed that the New York courts had "given the strongest support to the powers of the arbitrators thereunder and to the finality of their awards, and [had] refused to permit the invasion of technicalities in the application of the [Act] or the determination of rights under it." *1924 Hearing*, *supra*, 40 (Julius Cohen). In using the language of the New York Arbitration Act, Congress intended to adopt the settled meaning those terms had already acquired. *See Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 307 (1898); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (Congress is presumed to know law in an area in which it is legislating).

c. The differing approaches of the Illinois and New York statutes on this point were recognized by both sides of the debate that was brewing around the country about the substance of new arbitration laws being considered at both the State and federal level at the time of the enactment of the FAA. The National Conference of Commissioners on Uniform State Laws debated whether to adopt the New York approach or the Illinois approach for the Uniform Arbitration Act, and issued a report in 1924 that called attention to the fact that Illinois allowed court review of law whereas New York made "the arbitrator the final judge on matters of law and fact."

Report on the Uniform Arbitration Act, 34 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 639 (1924). After the enactment of the FAA, the National Conference criticized the fact that the "new Federal Act * * * and the New York and New Jersey Acts, make the decision of the arbitrators final in law and fact" and it urged States to enact the Uniform Arbitration Act in order to permit judicial review of an arbitration award for legal error. *Report on the Uniform Arbitration Act*, 35 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 758 (1925).

Indeed, the debate provoked comment by the then-Dean of Columbia Law School Harlan Stone, who noted in a major public address that, under the New York Arbitration Act, arbitrators "are not subject to any kind of judicial control or review" save "in extreme cases." Harlan F. Stone, *The Scope and Limitation of Commercial Arbitration*, 10 Acad. Pol. Sci. Proc. 501, 503, 506 (1923). This meant, he contended, that parties would be better off to avoid arbitration when "the law applicable to [the controversy] may be difficult to ascertain." *Id.* at 503, 502.

Supporters of the FAA did not argue, as petitioner contends (Pet. Br. 24), that the parties to an arbitration agreement under the FAA could agree to judicial review of any type they desired, so long as consistent with a "normal judicial function." To the contrary, they recognized that the New York Arbitration Act and the FAA did not authorize such judicial review and touted it as one of the virtues of those Acts. Julius Cohen, in his written testimony to Congress, explained that an application to confirm an arbitration award "must be granted as a matter of course, unless the award is vacated, modified, or corrected." He emphasized that "the grounds for vacating, modifying, or correcting an award are limited," and that if a ground identified in the statute were proven, "then and then only the award may be modified or corrected." *1924 Hearing*, *supra*, at 34; *see also id.* at 36 ("There is no authority and no opportunity [under the FAA] for the court, in

connection with the award, to inject its own ideas of what the award should have been.").

4. *Volt* and *First Options* do not support petitioner's contrary interpretation of the FAA

Because petitioner has neither text, structure, nor history on its side, it repeatedly attempts to find support in two decisions of this Court, *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), but neither provides the governing framework for this case.

Volt involved the relationship between the arbitration laws of two sovereigns, and thus relied on principles of federal preemption law to determine whether state law yielded to federal law. The Court held that the FAA did not preempt a California arbitration law that was similar, but not in all respects identical, to federal law because the state law did not frustrate the purposes of the FAA. But petitioner is not seeking to rely on a statutory scheme enacted by another sovereign. It seeks, in essence, this Court's sanction to be its own sovereign and establish a standard of review that is not the law of any State's current general arbitration act.[9]

The *Volt* Court's holding was also closely tied to the language of Section 4 of the FAA, which provides a right to seek a court order compelling arbitration. The Court held

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[9] After Congress's enactment of the FAA, the tide turned against state arbitration statutes modeled on the Illinois Arbitration Act, with its provision permitting judicial review for legal error. The National Conference adopted a new Uniform Arbitration Act in 1955 that, contrary to its earlier view, rejected judicial review for legal error and followed the FAA's grounds. *See* Macneil, *supra*, at 55-56. Eventually every State with a general arbitration statute (including Illinois) adopted a version that tracked the FAA's language regarding confirmation, vacatur, modification, and correction. *Id.* at 54-57.

that Section 4, consistent with its text, did "not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'" 489 U.S. at 474-475 (*quoting* Section 4). There is no similar language in Sections 9, 10 or 11 that ties the power of the court to confirm, vacate, modify, or correction an award to the "manner" of arbitration provided for in the parties' agreement.

Further, instead of governing whether or when an arbitration will proceed before an arbitrator, which was the issue in *Volt*, petitioner wishes to control through private agreement how a federal court must resolve an application to confirm or vacate an award. Whatever the scope of the parties' authority to dictate an arbitrator's tasks and methods, nothing in *Volt* allows the parties to dictate the grounds on which a court decides whether to confirm or to vacate an award.

First Options is also inapplicable. That case resolved the question whether a dispute about the arbitrability of an underlying controversy should be heard by the arbitrator or a court. The FAA did not directly address the question, and the Court held that the parties could agree to have an arbitrator decide whether the underlying dispute was arbitrable. That followed from the general rule that the parties can agree to have any controversy, including a controversy about the scope of arbitration, settled by an arbitrator. *See* 9 U.S.C. § 2.

Both *Volt* and *First Options* contain language that emphasizes that it is the parties' agreement, and not the efficiencies or inefficiencies of the parties' agreement, that justifies the courts abiding by the terms of the arbitration agreement. But neither case involved the judicial enforcement of an award. In neither case were the parties claiming that by agreement they could compel a court to do something not authorized by the statute. And in neither case was there clear evidence in the text, structure, and history of the FAA, as there is here, that Congress had

made a deliberate choice not to provide the particular authority that the parties sought.

B. Petitioner's Interpretation Of Section 9 To Allow Parties To Impose Conditions On Judicial Confirmation Of An Award Runs Contrary To Restrictions Against Private Party Control Over Judicial Authority, Has No Limit, And Raises Constitutional Doubt

Petitioner, to the extent it addresses the text of the FAA at all, focuses on the provision in Section 9 that makes judicial confirmation of an award available only where the parties agreed in their arbitration agreement to have a judgment of the court entered on the award. Petitioner argues that, because parties to an arbitration agreement can choose not to agree to have a court enter judgment on an award under the FAA at all, those parties are free (Pet. 23-24) to condition their agreement to have a court enter judgment on an award under the FAA on any grounds they desire (at least so long as it accords with what petitioner deems to be a "normal judicial function").

Section 9 cannot support that reading. Congress made Section 9 applicable only in instances where the arbitration agreement includes a provision for entry of a judgment on the award as a means to distinguish arbitration awards that can be enforced through the expedited judicial procedures of the FAA (because the parties agreed to it), from awards that are judicially enforceable only through a more laborious common law contract action (because they do not include such a provision). *See* 4 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 38.2.2, at 38:23-24 (1994). Congress did not intend to allow private parties to create their own grounds for vacatur.

1. Private parties cannot dictate the federal law that a court applies or control a court's exercise of equitable authority

It is well settled in this Court's cases, and petitioner and its *amici* concur, that the FAA's "purpose was to place an arbitration agreement 'upon the same footing as other contracts.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (*quoting* H.R. Rep. No. 68-96, at 1 (1924)); *see also Volt*, 489 U.S. at 474. But petitioner's contention regarding Section 9 would place parties to an arbitration agreement in a favored position and empower them to dictate the workings of a court in a manner that no party to any other type of contract is entitled.

Petitioner's view is that parties to an arbitration can redefine the federal cause of action under Section 9 for confirmation of an arbitration award to include whatever supplemental elements they like. That is contrary to well-established law that the courts will not be bound by stipulations by the parties as to what federal law is. On questions of law "the court cannot be controlled by agreement of counsel." *Swift & Co. v. Hocking Valley Ry. Co.* 243 U.S. 281, 289 (1917); *see also Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

This case is very different than the cases cited by petitioner (Pet. Br. 37) in which a party waived a statute of limitations, which is an affirmative defense that a court need not address at all unless raised by one of the parties. *See* Fed. R. Civ. P. 8(c); *Kontrick v. Ryan*, 540 U.S. 443, 453, 458-460 (2004). Petitioner in this case seeks to add new affirmative defenses to confirmation under Section 9 that Congress never intended. There is nothing in the FAA that warrants such an astounding result.[10]

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[10] Some courts have framed their rejection of petitioner's expanded judicial review in terms of a rejection of the parties' alteration of the

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Furthermore, in a standard civil action, a federal court is not bound by the parties' agreements about how a court will exercise its equity power. For example, a court's equitable authority to vacate a judgment on mootness grounds is not controlled by the parties' settlement agreement. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994). Likewise, in determining whether to enter an order embodying a remedy agreed to by all parties—a consent decree—a court is not bound by the parties' agreement. "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961).

Instead, absent a clear statement from Congress (such as that in Section 9 that a court "must" confirm an award unless certain grounds are present), a federal court holds broad discretion to vacate, correct, or modify a judgment. *See TVA v. Hill*, 437 U.S. 153, 193-194 (1978). Yet under petitioner's view, a court would be bound to vacate, modify, or correct an award based on grounds agreed to by private parties, rather than the grounds established by Congress.

"jurisdiction" of the federal courts, and petitioner acts as if those courts are concerned solely with subject-matter jurisdiction. Pet. Br. 30-31 n.6, 35-36; *see also* Pacific Legal Foundation Br. as *Amicus Curiae* 17-18. But the term "jurisdiction," used in a non-technical sense, *see Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1405 (2007), encompasses a whole host of interrelated doctrines about the role of an independent judiciary and the ability of litigants (or even Congress) to dictate the methods or results in a particular case. It is in this sense that petitioner's argument raises significant jurisdictional concerns.

2. Petitioner's "normal judicial function" suggestion only highlights that there is no meaningful stopping point to petitioner's argument

Petitioner's central argument would permit parties to an arbitration agreement to agree to require that a court rely on methods of dispute resolution that are foreign to American judicial proceedings (such as the inquisitorial as opposed to adversarial method of factfinding) or that are premised on decisionmaking standards not accepted by the judiciary (such as a coin toss or reference to astrological signs).

Aware of this enormous flaw in its theory, petitioner attempts to cabin its position by asserting that the grounds for confirmation or vacatur chosen by parties must be consistent with a "normal judicial function." Pet. Br. 24, 35. This purported limitation is, of course, created out of whole cloth and does not establish any true limit.

District courts regularly apply a wide range of review standards under a variety of federal statutory schemes. Thus, there are multiple grounds for review that parties could choose, each of which may be consistent with a "normal judicial function." For example, a district court could be required to review an arbitration award for "substantial evidence" or "arbitrary, capricious * * * abuse of discretion." 5 U.S.C. § 706 (standards of review applicable under the Administrative Procedures Act). Or a district court could be required to determine whether an award complies with "a reasonable interpretation of clearly established law." 28 U.S.C. § 2254(d)(1) (standard for district court assessment of certain legal questions in habeas corpus proceeding). Another agreement might call for a court to review an arbitrator's findings for clear error, *see* Fed. R. Bank. P. 8013 (standard for district court review of bankruptcy judge findings of fact), while another might require an assessment of whether an arbitrator has made an "unreasonable determination" of the facts,

28 U.S.C. § 2254(d)(2) (standard for district court assessment of facts found by a state court in the context of a habeas proceeding). The law on judicial confirmation and vacatur of arbitration awards would develop with little consistency, much less certainty, in light of the myriad standards that parties could require courts to apply.

Under petitioner's theory (Pet. Br. 35), parties to an arbitration agreement could even require a court to review factual findings in an arbitration award *de novo*. *See United States v. Raddatz*, 447 U.S. 667, 676 (1980) (*de novo* review by district court in case involving recommendations by magistrate judge). *De novo* review would certainly render arbitration nothing more than a dress rehearsal for full-scale court litigation which is directly contrary to the purpose of the statute.

Nothing in petitioner's theory is limited to trial courts. Its theory means that parties to an arbitration agreement could choose their own standards for the *appellate* court review that is authorized under Section 16, as a condition for court entry of judgment. Parties presumably could set whatever standard they chose for review of a confirmation, vacatur, modification, or correction of an award, to be applied by even this Court. Indeed, because appellate courts sometimes engage in *de novo* review of facts, *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984), petitioner would apparently permit parties to foist *de novo* review on appellate courts.

The logic of the proposal would allow parties to agree to *override* the statutory vacatur grounds and agree to require confirmation of an award by a court notwithstanding the existence of grounds for vacatur or modification under Section 10 or 11. *Cf. Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64-65 (2d Cir. 2003) (court refused to follow parties' agreement to have award confirmed even if grounds for vacatur of award under Section 10 exist). This would mean that, if the parties

so agreed, a court would be compelled to confirm an award and enter judgment on it even if, for example, an arbitrator was obviously biased or refused to hear material evidence—an untenable situation for the court engaging in the judicial review.

3. Petitioner's interpretation of the FAA raises serious constitutional doubt under Article III

Petitioner contends (Pet. Br. 35-36) that what it seeks to impose on the judiciary is the equivalent of a court relying on a magistrate judge, special master, or bankruptcy court. In fact, those analogies reveal constitutional doubts about petitioner's argument.

This Court has consistently held that Article III imposes some limits on the ability of Congress or parties to require Article III judges to give their imprimatur to the conduct of non-Article III decisionmakers. *See Crowell v. Benson,* 285 U.S. 22, 51-65 (1932). Critical to this Court's holding that Congress can, consistent with Article III, delegate certain functions to magistrate judges was the fact that "[m]agistrates are appointed and subject to removal by Article III judges" and "the entire process takes place under the district court's total control and jurisdiction." *Peretz v. United States*, 501 U.S. 923, 937 (1991) (*quoting Raddatz*, 447 U.S. at 683). The same is true of special masters, *see* Fed. R. Civ. P. 53, and bankruptcy judges, *see Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 n.2 (1995) (Ginsburg, J., concurring). It is not true for arbitrators.

When parties agree to be bound by arbitration, they agree, in essence, to have the arbitrator speak for both parties in the arbitration award with regard to the meaning of the agreement. *Cf. Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (arbitrator's interpretation and application of contract is treated by courts as if parties agreed to it). And

when a court engages in the statutorily prescribed review of such an award under Sections 10 and 11, the court reviews the process by which the award was made, not the correctness of the law or factfinding. In those circumstances, no Article III concerns arise because the arbitrator is acting as the representative of the parties and the court is not reviewing the substance of the award. The court is merely ensuring that the arbitrator was authorized to speak for the parties on the issue and that the process used by the arbitrator met the minimal requirements of the FAA so as to ensure an unbiased answer.

But if a court reviews the legal and factual correctness of an arbitration award at the directive of private parties, then it is hearing an appeal from a private decisionmaker without any control over that decisionmaker and, thus, without the Article III check on the process. To the extent that the arbitrator is serving in an advisory capacity, collecting a record, and making recommendations on the facts and law that the district court must review, the same Article III concerns raised by reliance on magistrate judges to render decisions may be implicated. This constitutional doubt must be considered in interpretation of the FAA, which one of petitioner's own *amici* characterizes as a close question of statutory interpretation. *See* Br. of CTIA as *Amicus Curiae* 2.

4. Petitioner's novel legal theory under Section 9 does not entitle it to reversal of the court of appeals' judgment, much less the relief it obtained in the district court

a. Petitioner's novel theory that the parties agreed to have an award judicially confirmed under Section 9 of the FAA only if subject to certain conditions founders on the text of the arbitration agreement in this case. Looking at the text of the arbitration agreement, the parties, in a single sentence, unconditionally agreed that they would submit the award to the court "for the confirmation of the

decision as a judgment of such court." Pet. App. 15a (¶ 24). That sentence thus made applicable a court's duty under Section 9 to confirm the award unless grounds under Section 10 or 11 existed. The language that sought to enhance the power of the court to vacate, modify, or correct the award on nonstatutory grounds was included in other sentences that did not contain any express language conditioning the entry of judgment on such power. *Id.* at 15a-16a (¶¶ 24, 27). And the court of appeals ruled that the sentences were severable. *Id.* at 115a (parties did not intend "that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed"); *see supra*, note 2. Petitioner offers no ground, and there is none, for not also recognizing that the one provision was not conditioned on the other. (The court of appeals did not directly address the question in terms of whether the agreement was conditional because petitioner did not press its novel reading of Section 9 below, but its state law holding is equally applicable.).[11]

b. Petitioner acknowledges that there is nothing in Section 10 or 11 of the FAA that permits vacatur, modification, or correction based on errors of law or fact.[12]

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[11] Whether the arbitration agreement conditioned the enforcement of an arbitration award on another provision is a question, like the question of severability, that is governed by state law because "state-law principles of contract interpretation" govern "an arbitration agreement within the scope of the Act." *Volt*, 489 U.S. at 475-476. To the extent federal law plays a role, it requires that any ambiguities in the arbitration agreement be "resolved in favor of arbitration" based on "the federal policy favoring arbitration." *Id.* at 476. Petitioner argued below that the severability question was a question governed by Oregon state contract law. *See* Pet. C.A. (No. 03-35525) Br. 33 n.7; Pet. C.A. (No. 03-35525) Pet. for Reh'g 10-11.

[12] Indeed, petitioner's Question Presented asks whether parties can agree to "more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA." Pet. i; *see also* Pet. Br. 13 (standard of review in parties' arbitration agreement is "different than the statutory grounds for vacatur or modification under sections 10 or 11"). That the grounds for review in

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It rests its legal arguments before this Court on its contention that the agreement cannot support confirmation of the original award because, under petitioner's theory, the confirmation was conditioned on the nonstatutory grounds of vacatur.

But that theory cannot support the relief that petitioner sought and initially received from the district court, which was vacatur under Section 10 of the arbitrator's original award and entry of a modified award under Section 11 in its favor. Vacatur and modification of an award are not available in the cause of action under Section 9 to confirm an award, which is where petitioner now rests its case. It is only in the separate causes of action to vacate or modify under Sections 10 and 11 that such remedies are available. Thus, even if petitioner could prevail on its argument regarding conditions placed on the agreement to judicial confirmation under Section 9 (Pet. Br. 24-25), that legal theory would entitle petitioner only to a denial of the application to confirm the award (if it could show an error in law or fact), but not to a vacatur of the award itself, and not to a judicial modification of the award and entry on such award. If petitioner prevails, the parties would be left to a state law contract action to determine the enforceability of the award. *See* 4 Macneil, Speidel & Stipanowich, *supra*, § 38.2.2, at 38:23-24.

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the arbitration agreement "differ from those of the FAA respecting action by a court" was also petitioner's view in the court of appeals, including when it was seeking rehearing *en banc* and not bound by any Ninth Circuit precedent. *See* Pet. C.A. (No. 03-35525) Pet. for Reh'g 13. Further, by framing the question in terms of the district court's authority under the FAA and claiming that there was a split in the circuits on this question, petitioner abandoned the argument, which it made in the court of appeals, that the expanded review provision of this agreement to arbitrate was not governed by the FAA. *See* Pet. 8-9 (summarizing arguments made but rejected in court of appeals); Pet. C.A. (No. 03-35525) Br. 27, 31, 33; Pet. C.A. (No. 03-35525) Pet. for Reh'g 2, 9-10.

C. Petitioner's Position Is Contrary To The Core Purposes Of The FAA, Would Lead To Havoc For Arbitrators And Courts Alike Rather Than Lessen Burdens On Courts, And Fails To Account For Appellate Arbitration

Petitioner's policy arguments and its broad declaration that its interpretation does not undermine the goals and policies of the FAA (Pet. Br. 31-40), ignore the fact that these very arguments were widely known and debated in the legal community at the time of the FAA's enactment. To the extent parties to an arbitration agreement want further review of a decision by an arbitrator that differs from that permitted by the FAA, appellate arbitration has been and continues to be an available option.

1. Judicial review for legal and factual error is contrary to the public purposes of the FAA and would create burdensome confusion in arbitration and the courts

Petitioner ignores the central public purposes of the FAA to foster finality in arbitration awards and to promote arbitration as an alternative to, not a prelude to, costly and time-consuming litigation. Selection by parties of nonstatutory grounds for judicial vacatur, modification, and correction of arbitration awards based on error of law or fact is contrary to those core purposes.

a. Petitioner's argument must be rejected because it would lead to havoc for arbitrators and courts alike. For example, judicial review of arbitration awards for errors of law or fact would almost certainly mean that arbitrations would become like court proceedings, with adoption of explicit limits on the scope of the record, rulings on evidentiary objections, and formal findings. That would burden the arbitration process and seriously undermine the time and cost savings that arbitration is supposed to yield.

Or, if arbitration proceedings remained informal and less structured, courts would be thrown into the disconcerting role of reviewing for factual error where rules of evidence do not govern, for legal error where legal rulings are based on such records, and reviewing awards with no requirement for a detailed written rationale. Such a system would almost certainly lead to wasteful remands to arbitrators to require them to amend their decisions to "show their work," even where the arbitrator then reaches the same decision (as happened in the instant case on the question of the interpretation of the lease term "predecessor-in-interest," where the district court remanded for a fuller factual explication in the decision and the arbitrator reached the same conclusion after adding a few evidentiary references and discussion to its decision).

Imposition of additional work on arbitrators for failure to provide court-like legal rulings contravenes the purpose of the FAA. *See Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184 (7th Cir. 1985) (Posner, J.). One of the benefits of arbitration is supposed to be that "[t]he usual court atmosphere does not get into the arbitration hearings." *1924 Hearing*, *supra*, at 7 (Charles L. Bernheinmer); *cf. A.O. Andersen Trading Co. v. Brimberg*, 197 N.Y.S. 289, 290 (N.Y. Sup. Ct. 1922) (rejecting party's claim that the arbitrator erred in refusing to "have the testimony taken down by a stenographer and transcribed" because "defendant's insistence for a stenographic record was based upon his desire to review rulings upon testimony and points of law. But such a review, as already stated, is something he would not be entitled to.").

In either event, a number of inevitable questions will then arise for the reviewing court including, for example, what to do about harmless error analysis in party-created grounds for vacatur, modification, or correction.

And permitting the parties to define the terms of judicial review of questions of law will lead to collateral disputes regarding difficult questions of what the parties intended to constitute a question of law. *See Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."). In cases such as this, where the meaning of the parties' underlying lease agreement may be viewed as a question of law, fact, or a mixed question of fact and law in different States and under different circumstances, there are no easy lines to draw.[13] Indeed, a leading arbitration scholar explained 80 years ago, in criticizing a state statute based on the Illinois Arbitration Act, that if such judicial review were permitted, a court would need to resolve whether the following are questions of law subject to judicial review: "the construction or interpretation of a written document;" "what is the law of a certain state or country;" "competency and credibility of witnesses and the admissibility and materiality of testimony." Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act*, 6 N.C. L. Rev. 363, 407 (1927).

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[13] Even if a district court reviews a question of "law," the court may well have to review factual evidence presented to the arbitrator. For example, Oregon contract law, which governs the interpretation of the underlying lease in this case, provides that whether "the terms of an agreement are ambiguous is in the first instance a question of law for the trial court," but that the court "may consider parol and other extrinsic evidence to determine whether the terms of an agreement are ambiguous." *Abercrombie v. Hayden Corp.*, 883 P.2d 845, 853 (Or. 1994). If the trial court concludes that the terms are ambiguous (and the relevant lease terms here are, at a minimum, ambiguous) it is for the factfinder to resolve the ambiguity. *See ibid.*

Under petitioner's view, parties may mix and match grounds for vacatur of an award and standards of review. That will not lessen the burden on the district court; it will increase it. And the uncertainty about harmless error, about whether an issue is one of law or fact, etc., will create more, not less, work for district courts because they will be required to treat each case under the FAA *sui generis*.

b. Judicial review of the substance of an arbitration award would transform arbitration into a mere prelude to litigation and thus burden the parties with an exhaustion requirement without benefiting the courts. Instead of the arbitration being the "main event," it becomes a " 'tryout on the road' for what will later be the determinative" judicial proceeding. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). During the national debate on the issue in the 1920s, Julius Cohen explained that the New York Arbitration Act had not included a provision permitting judicial review of errors of law, as was permitted in Illinois and previously in England, precisely because "the introduction of legal questions for disposition by the courts destroyed the very effect of arbitration and really made for litigation." 34 *Proceedings of the National Conference of Commissioners on Uniform State Laws* 98 (1924) (statement of Julius Cohen); *see also Burchell v. Marsh*, 58 U.S. 344, 349 (1854) (holding that "a court of equity will not set [an arbitration award] aside for error, either in law or fact" because a "contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.").

Petitioner's *amici* suggest that parties to an arbitration agreement will include a provision for review of law and fact in an agreement only if there is a substantial interest at stake for one of the parties. *See* Br. of CTIA as *Amicus Curiae* 8; New England Legal Foundation, *et al.* Br. as *Amici Curiae* 14-15. But that is

no limit because, of course, parties to an arbitration agreement likely view what is at stake to be substantial even if not so viewed by others. And, if this type of review is generally available under the FAA, employees or homeowners may be able to argue that the absence of such review provisions in their arbitration agreements reflects a level of unfairness rising to the level of contractual unconscionability. Thus, extensive judicial review provisions could become part of a significant portion of the arbitration docket.

2. Appellate arbitration protects against any risk of an anomalous decision by an arbitrator

The fact that the FAA does not permit judicial review of arbitration awards for errors of law or fact does not mean that parties cannot protect themselves from the risk of an anomalous decision by an individual arbitrator.

First, the FAA authorizes the parties to select a particular arbitrator or to determine the qualifications of the arbitrator (or arbitrators) who will settle their controversy. *See* 9 U.S.C. § 5. Thus, parties can agree to have the controversy resolved by an arbitrator who is a retired judge or other legal expert in the relevant area of law. *See* 3 Macneil, Speidel & Stipanowich, *supra*, § 27.2.3, at 27:4-7. Indeed, a representative of what is now the American Arbitration Association told Congress in 1924 that if questions of law are at issue, it was not uncommon for the parties to agree to have "some retired jurist, or a lawyer * * * sit and pass on them." *1924 Hearing*, *supra*, at 27 (statement of Alexander Rose, representing the Arbitration Society of America).

Further, appellate arbitration services are available through all the leading arbitration associations. Appellate arbitration services allow parties to agree to a full review by another arbitrator or arbitrators of an award under

whatever standards the parties choose.[14] As one scholar noted the year after the FAA was enacted, in such "comparatively rare cases" where "large sums are at stake and it is felt that there should be an opportunity to review the arbitrators' decision to correct any mistakes, inadvertent or otherwise," the "arbitration agreement could well be drawn to provide for a review by a board of appeal." Wharton Poor, *Arbitration under the Federal Statute*, 36 Yale L.J. 667, 676 (1926). Appellate arbitration is preferable, he opined, to the method then existing in England for judicial review because "a right to review by the courts adds considerably to the potential expense of the proceedings and is, in substance, adding a fifth wheel to the wagon." *Ibid.*

Thus, judicial review is not necessary to preserve the integrity of arbitration awards. The parties can contract for such review within the arbitration system. What they cannot do is impose responsibilities on the federal courts that Congress, in the FAA, did not authorize.

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[14] *See* American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* 37 (2007), *available at* http://www.adr.org/si.asp?id=4125; American Arbitration Association, *The AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* 18-19 (2007), *available at* http://www.adr.org/si.asp?id=4366; CPR, The International Institute for Conflict Prevention & Resolution, *Arbitration Appeal Procedure* (2005), http://www.cpradr.org/arb_appeal_intro.asp?M=9.2.3; JAMS, *Optional Arbitration Appeal Procedure* (2003), *available at* http://www.jamsadr.com/images/PDF/optional_arbitration_appeal-2003.PDF.

Indeed, one of petitioner's own *amici*, the CTIA, sponsored arbitration rules that are administered by the American Arbitration Association that expressly allow parties to agree to appellate arbitration. *See Wireless Industry Arbitration Rules* § L-6 (2003) ("The parties may provide by prior agreement for the review of any award. * * * The review will be conducted by a new arbitrator selected in the same manner as the initial arbitrator, subject to any conditions to which the parties have agreed. The review arbitrator * * * may review the original award to the same extent as the original arbitrator."), *available at* http://www.adr.org/sp.asp?id=22010.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 06-989

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Supreme Court of the United States

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Petitioner,

v.

MATTEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening brief remains correct.

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The Federal Arbitration Act's ("FAA") primary purpose is "ensuring that private arbitration agreements are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Because arbitration under the FAA is a matter of contract, the FAA allows "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." *Volt Info. Sciences*, 489 U.S. at 479. Consistent with those precepts, the FAA does not prohibit enforcement of private arbitration agreements in which the parties agree to judicial review of an arbitration award for legal error.

Petitioner Hall Street Associates ("Hall Street") and respondent Mattel, Inc. ("Mattel") voluntarily entered into an agreement explicitly preserving legal error as a ground for judicial vacatur of the arbitration award. Having made that bargain, Mattel now seeks to avoid it, arguing that the FAA does not list legal error as a ground for vacatur. Mattel's argument fails because the FAA's statutory grounds for vacatur are not exclusive.

The FAA does not preempt or forbid agreements which restrict the submission to the arbitrator and reserve final authority over legal issues to the court. To the contrary, the FAA ensures private parties' freedom to contract for arbitration provisions – including legal-error review provisions – which are tailored to their individual dispute resolution needs. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); *Dean Witter Reynolds*, 470 U.S. at 221 (courts must "rigorously enforce agreements to arbitrate" according to their terms).

Mattel's statement of the case is a distraction, calculated to imply that the district court erred in concluding that the award contains legal error.[1] Resp. Br. 11. But even the reviewing

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[1] Although Mattel claims that the district court vacated the arbitration award "based on its view that there were errors of fact and law underlying the award," Resp. Br. 1, the district court reviewed only claims of legal error. Pet. App. 51a-56a. Mattel also insinuates that the district court's review of the arbitration award was irregular because Hall Street did not provide the full arbitration record to the court. Resp. Br. 11. Each party, however, directed the court to those parts of the record that they deemed relevant. Jt. App. 4-5 (Dt. Ct. Dkt. Nos. 71 (February 13, 2002); 73 (February 25, 2002); 77 (March 8, 2002)). The complete arbitration record was lodged with the court well before its second opinion vacating the award. Jt. App. 10-12 (Dt. Ct. Dkt. Nos. 130-131, 144 (July 15, 2003); 135-137 (July 30, 2003); 138 (August 11, 2003); 139-141, 145 (August 18, 2003)).

court below acknowledged that "the arbitrator's assessment of the merits in this case contains possible errors of law[.]" Jt. App. 156. The dissenting judge concluded that "the arbitrator's decision was completely irrational." *Id.* at 157.

Ultimately, however, the correctness of the arbitrator's decision is beside the point. The only question before this Court is whether the FAA prohibits parties from limiting the submission to the arbitrator and agreeing that a court may vacate the arbitration award for legal error. Because nothing in the FAA – or any other law – prohibits such agreements, the parties' arbitration agreement should be enforced.

ARGUMENT

I. THE FAA DOES NOT FORBID PARTIES FROM AGREEING THAT AN ARBITRATION AWARD WILL BE VACATED FOR LEGAL ERROR.

Mattel wrongly suggests that Hall Street must show that the FAA affirmatively authorizes arbitration agreements providing for legal-error review. *See, e.g.*, Resp. Br. 16. In fact, it is Mattel's burden to show that the FAA affirmatively prohibits arbitration agreements preserving judicial authority to review for legal error, or that such agreements otherwise are unenforceable as a matter of law. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (section 2 of the FAA establishes a presumption in favor of the enforceability of private arbitration agreements according to their terms); *see also Muschany v. United States*, 324 U.S. 49, 66 (1945) ("As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy."); *Baltimore & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) ("the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their

obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare"). Mattel cannot make that showing.

A. The FAA Did Not Withdraw the Courts' Traditional Authority to Vacate Arbitral Awards for Legal Error Based on the Contracting Parties' Agreement.

Prior to the adoption of modern arbitration statutes, courts long had exercised their authority to review and vacate arbitral awards for legal error when parties provided for the application of legal rules in their arbitration agreements or clearly stated their intent to restrict the submission to the arbitrator. As Justice Story explained in *Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814):

> If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please. If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

See also Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 401 (1875) ("If it appear[s] from the award that the arbitrators intended to decide the case according to the law, and the grounds for their decision are set out, which in law do not justify it, the case is brought within the exception to the general rule, and the court will set it aside."); *Greenough v. Rolfe*, 4 N.H. 357, 359 (1828) (same).

Mattel does not dispute that courts traditionally possessed authority to review and vacate arbitral awards for legal error when specified by agreement. According to Mattel, however, § 9 of the FAA is a "patently clear" expression of congressional intent to divest courts of authority to vacate arbitral awards for legal error, even when parties expressly and

unambiguously preserve legal error as a ground for vacatur in their agreement. Resp. Br. 21. Mattel's argument focuses on only a select portion of the text of § 9 and ignores the qualifying text that precedes it.

Section 9 requires a court to enter an order confirming an arbitration award *only* "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration[.]" 9 U.S.C. § 9. The text of § 9 expresses Congress's intent that a court must enforce the agreement of the parties as to whether, and under what circumstances, a judgment shall be entered on an award. In so providing, § 9 necessarily allows parties to define and limit the scope of the arbitration and the arbitrator's power. Here, the parties plainly did not "agree[] that a judgment of the court shall be entered upon the award" unless and until the court decided that the award did not contain legal error. 9 U.S.C. § 9.

This point is driven home by § 2 of the Act, which makes clear that parties' agreements – including agreements specifying supplemental grounds for vacatur – are paramount when the agreements otherwise are enforceable under contract law. *See* 9 U.S.C. § 2 (arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Section 2 establishes a "broad principle of enforceability" of arbitration agreements according to their terms. *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). Mattel's restrictive interpretation of § 9 would place that provision of the FAA in needless tension with § 2 and the FAA's statutory policy of "unobstructed enforcement of arbitration agreements." *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23; *see also Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 200-01 (2000) (refusing to endorse restrictive reading of the venue provisions in §§ 9 to 11 of the FAA, in part because

such a reading could deprive the parties of the forum previously selected by agreement of the parties). Section 9 should not be interpreted to invalidate agreements concerning the prerequisites for a binding arbitration award. Parties who agree to judicial review for legal error agree to be bound by an arbitration award *only* if the court confirms that the award contains no legal error.[2]

Contrary to Mattel's claim, interpreting § 9 to allow parties to specify legal error as a ground for vacatur of arbitration awards does not deprive § 9's references to §§ 10 and 11 of meaning. Parties generally accept the limited grounds for vacatur or modification of arbitration awards under the FAA and common law. *See* Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 KAN. L. REV. 429, 443 (2004). In those cases, §§ 10 and 11 – and the common-law exceptions – provide the sole grounds on which a court may decline to enforce an award.

Sections 10 and 11 apply even when parties specify additional grounds for vacatur or modification of arbitration agreements. In those cases, §§ 10 and 11 establish a default rule which parties may agree to supplement with additional grounds for vacatur, so long as those additional grounds are consistent with normal judicial functions and otherwise enforceable as a matter of contract law.

Mattel also contends that an arbitration agreement preserving judicial authority to review for legal error is not an

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[2] This reading of the FAA is strongly supported by the fact that "absent an affirmative indication of Congress' intent to preclude waiver, [this Court has] presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Mattel's position necessarily is that the right to confirmation of an award with legal errors cannot be waived, no matter how clear and unmistakable that waiver is. Nothing in the FAA suggests that the parties here could not waive any alleged statutory right to confirmation of an award containing legal errors; in light of the FAA's focus on enforcement of the parties' agreement, the opposite is true.

arbitration agreement within the meaning of § 2 because it does not "settle" the controversy. Resp. Br. 25. Mattel's argument proves too much. Under Mattel's logic, such an arbitration agreement is not even subject to the FAA because, according to Mattel, judicial-review provisions prevent the agreement from constituting an agreement to "settle" the parties' dispute by arbitration. If this is true, any statutory limits on judicial review of the arbitration award would not apply in any event.

Mattel's contention that legal-error review provisions deprive arbitrators of authority to "settle" disputes is also incorrect. Parties who enter arbitration agreements containing such provisions simply limit the scope of their submission to the arbitrator and preserve the court's authority to review an award for legal error. If no party contests the award or if the court finds neither legal error nor any statutory or common-law ground for vacatur, the award "settles" the dispute.

Finally, Mattel argues that § 10 prescribes the exclusive grounds for vacatur of an award because certain sections of the FAA expressly apply only in the absence of a contrary agreement by the parties. Resp. Br. 22; *see also, e.g.*, 9 U.S.C. § 5 (providing the method for selecting an arbitrator if "no method be provided" in the parties' agreement). This Court's decisions demonstrate that Mattel's interpretation of the FAA is wrong. This Court repeatedly has recognized that provisions of the FAA which contain no reference to the parties' agreement nonetheless may be varied by mutual consent. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), for example, this Court made clear that parties may agree that the question of arbitrability will be decided by the arbitrator, rather than by the courts, even though § 3 of the FAA assigns the task of determining whether an issue is "referable to arbitration" to the courts,

without any express reservation of the parties' right to agree otherwise.

Similarly, in *Volt Info. Sciences*, the parties' contract specified that disputes would be governed by California law. Volt sought to compel arbitration under the FAA, while its opponent, Stanford, sought to stay the arbitration pending the outcome of related litigation under California law. 489 U.S. at 470-71. This Court recognized that the FAA contained no provision authorizing a stay of arbitration pending litigation or allowing the parties to agree to such a provision. *Id.* at 476-77. The Court nonetheless affirmed the state court's enforcement of the parties' agreement to apply California law on the stay question, stating: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. *See also Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("the *limited objective* of the [FAA] was to abrogate the general common-law rule against specific enforcement of arbitration agreements" (emphasis added)).

Mattel's proffered reading of §§ 9 and 2 would give binding effect to arbitration awards which *violate* the parties' express agreements. Although the FAA promotes the enforceability of arbitration agreements, this Court has cautioned that "the FAA does not require parties to arbitrate when they have not agreed to do so[.]" *Volt Info. Sciences*, 489 U.S. at 478. Parties who agree to judicial review for legal error expressly have declined to accept the arbitrator's legal rulings as final; instead, they have agreed to be bound by an arbitration award *only* if the court confirms that the award contains no legal error. Nothing in the FAA evinces a congressional intent to forbid courts from reviewing arbitral awards for legal error where, as here, the parties unambiguously agreed to that review.

B. This Court's Decisions Confirm that the Statutory Grounds for Vacatur or Modification of Arbitration Awards Are Not Exclusive.

In arguing that § 10 sets forth the exclusive grounds for vacatur of arbitration awards despite the parties' agreement to judicial review for legal error, Mattel attempts to distinguish this Court's decisions establishing that the FAA's grounds for vacatur and modification of arbitration awards are not exclusive. Mattel's arguments are unpersuasive.

Mattel claims that this Court has not recognized any grounds for the vacatur or modification of arbitration awards other than those in §§ 10 and 11. Resp. Br. 23. Faced with *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), Mattel argues that "manifest disregard" of the law either is not a ground for vacatur at all or is encompassed within § 10.

Wilko cannot be so easily distinguished. First, this Court subsequently has referred to "manifest disregard" as a non-statutory ground for vacatur. *See First Options*, 514 U.S. at 942 (listing "manifest disregard of the law" as additional to the grounds for vacatur listed under § 10 and noting that *Wilko* had been "overruled on other grounds"); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (Blackmun, J., concurring in part and dissenting in part) (describing judicial review under the FAA as normally limited to "the four grounds listed in § 10 of the [FAA] *and* to the concept of 'manifest disregard' of the law" (emphasis added)). Most lower courts also correctly recognize "manifest disregard of the law" as a "non-statutory" ground for vacatur of arbitration awards. *See, e.g., McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 n.6 (1st Cir. 2006) ("Nowhere in 9 U.S.C. § 10 does the phrase 'manifest disregard of the law' appear."); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 65 (2d Cir. 2003) (describing "manifest disregard of the law" as

a common-law ground for review); *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 396 (5th Cir. 2003) (same); *Scott v. Prudential Sec. Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998) (same).

Mattel's dismissal of *W.R. Grace Co. v. Local Union 759*, 461 U.S. 757 (1983), is similarly unconvincing. Although *W.R. Grace* involved arbitration under a collective bargaining agreement, this Court's reasoning was not limited to that context. Indeed, this Court expressly stated that the public policy exception applied to "any contract." *Id.* at 766. No reason exists for arbitration agreements under the FAA to be exempt from that rule. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (FAA covers most employment contracts).[3]

In sum, the FAA does not establish the exclusive grounds for vacatur of awards even under federal law, and it certainly does not preempt the parties' right to contract for different arbitration rules and proceedings. Indeed, *Volt Info. Sciences* makes clear that the FAA does nothing to limit parties' ability to shape their arbitration agreements as they see fit, even if they voluntarily invoke the law of another sovereign. *See* 489 U.S. at 479 (parties may limit scope of arbitration agreements and structure as they see fit). Although Mattel argues that allowing parties to contract for legal-error review provisions would permit parties "to be [their] own sovereign[s,]" Mattel identifies no reason – nor is any apparent – why parties should be limited to adopting state arbitration laws. The

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[3] The courts of appeals routinely apply the "public policy" ground for vacatur to FAA cases. *See, e.g., Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007) (describing manifest disregard and public policy exceptions as additional to statutory grounds for judicial review under FAA); *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (arbitrary and capricious, manifest disregard of the law, and public policy grounds for vacatur supplement the FAA's statutory grounds for vacatur).

FAA's paramount policy and purpose is the enforcement of parties' agreements to arbitrate according to the parties' terms. *See, e.g., Mastrobuono*, 514 U.S. at 53-54. Nothing in the FAA or any preemption doctrine precludes parties from setting their own contract terms. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 221 (1995) (holding federal law preempting state regulation nonetheless "allows room for court enforcement of contract terms set by the parties themselves").

C. The Legislative History of the FAA Confirms that the FAA's Primary Goal Is Enforcement of Private Agreements to Arbitrate.

According to Mattel, the FAA's legislative history "reflects a deliberate choice by Congress to reject the alternative approach of some of the contemporaneous arbitration laws that permitted vacatur of arbitration awards for legal error." Resp. Br. 27. An examination of that legislative history reveals no support for Mattel's contention.

The FAA's purpose was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW – REFORMATION, NATIONALIZATION, INTERNATIONALIZATION, at 15 (1992) ("AMERICAN ARBITRATION LAW") (the primary goal of FAA proponents was making arbitration agreements enforceable and irrevocable). Prior to the FAA's enactment, arbitration agreements commonly were revocable at any time prior to the issuance of an award. MACNEIL, AMERICAN ARBITRATION LAW, at 20. The FAA's proponents were focused on making arbitration agreements fully enforceable and irrevocable – not

on the grounds for vacatur.[4] *See, e.g., Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 before the Senate and House Subcomm. of the Comms. on the Judiciary*, 68th Cong., at 7 (1924) ("*1924 Hearings*") (testimony of Charles L. Bernheimer, urging the FAA's adoption so that "the parties cannot, as they can in most of our States and certainly in connection with interstate business, back out at the last moment when they see the case is going against them.").

Mattel suggests that Congress deliberately divested courts of authority to review arbitration awards for legal error by rejecting Illinois's arbitration statute and, instead, modeling the FAA after the New York Arbitration Act of 1920. Resp. Br. 27. A review of the legislative history reflects no such deliberation. The FAA was drafted by the American Bar Association and was the sole proposal presented to Congress. MACNEIL, AMERICAN ARBITRATION LAW, at 92. At *no* point in the congressional hearings did any person mention – much less argue against – the Illinois Arbitration Act of 1917 or its standards of judicial review.[5] Instead, proponents presented

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[4] Mattel's reliance on the statements of ABA delegates ignores this Court's admonition that the Court "ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal - even assuming the precise intent of the group can be determined[.]" *Circuit City Stores*, 532 U.S. at 120. Mattel also relies on statements by ABA delegates which were not even made to Congress, but rather to the National Conference of Commissioners on Uniform State Laws. *See, e.g.*, Resp. Br. 29.

[5] Notably, the Illinois Act did not address consensual agreements to permit review for legal error. Instead, it endorsed an approach whereby either party could seek a judicial determination of *any* legal questions that arose during the arbitration, and the arbitrator would be compelled to follow the court's legal decision. *See* Laws of Ill. 1917, ch. 202, § 6(a). Thus, even if Congress deliberately had rejected the Illinois Act – which it did not – that would not reveal a congressional intent to prohibit agreements allowing courts to vacate arbitral awards for errors of law.

the FAA to Congress as the only approach to arbitration with "no open opposition anywhere." *1924 Hearings*, at 13 (testimony of Julius Cohen).

Nor is there any evidence in the FAA or its history that Congress intended to deprive courts of preexisting authority to review arbitral awards for legal error when parties stipulate to such review in their arbitration agreements. *See* 65 CONG. REC. 1931 (1924) (testimony of Rep. Graham, stating: "[the FAA] does not involve any new principle of law except to provide a simple method by which parties may be brought before the court in order to give enforcement to that which they have already agreed to. . . . It does nothing more than that."). Certainly, the assertion that the FAA is modeled after the 1920 New York Arbitration Act does not assist Mattel because the New York statute did not prohibit legal-error review provisions.

The availability of judicial review for legal error traditionally depended on the parties' arbitration agreement. *See* James M. Gaitis, *Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 PEPP. DISP. RESOL. L.J. 1, 17 (2007) ("From its earliest beginnings, the foundation of American arbitration law always has been the fundamental principle that it is the parties' 'submission' that determines the scope of the arbitrators' authority and, in consequence, the power of courts to vacate arbitral awards."). If the parties did not reserve the court's authority to review the arbitral award, courts interpreted their agreements to give final authority to the arbitrator on issues of both law and fact. *See, e.g.*, *Kleine*, 14 F. Cas. at 735. But if the parties stipulated that a court would review an award for legal error, the courts honored those agreements. *Id.*

New York applied that same rule. Although review for legal error was generally unavailable under New York law, New York courts reviewed arbitral awards for legal error

when the parties' contract contemplated such review. *See Fudickar*, 62 N.Y. at 400 ("[An arbitration award] may also be set aside for error of law, when the question of law is stated on the face of the award, and it appears that the arbitrators meant to decide according to the law but did not."). Although that common-law authority predated the 1920 New York Arbitration Act, contemporaneous commentators did not view the statute as restricting judicial authority to review for legal error. *See* Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 603 (1933-34) ("In all states, if the parties provide in their arbitration agreement that the arbitrators must decide according to law, the courts will hold the arbitrators to that agreement and will review their law on appeal"); WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS, at 500, 503 (1930) ("under an unrestricted submission arbitrators are not required to decide 'according to law'" but "if it is made to appear that the arbitrators undertook to decide according to law but missed it," the court may vacate award). Thus, Mattel's claim that Congress intentionally modeled the FAA after the New York statute does not prove any congressional intent to divest courts of their authority to review arbitration awards for legal error when parties expressly agree that legal error is a ground for vacatur.

II. THE PARTIES' AGREEMENT TO LIMITED ARBITRATION IS FULLY ENFORCEABLE AND DOES NOT INTERFERE WITH JUDICIAL FUNCTIONING AND INTEGRITY.

In the absence of barriers to legal-error review provisions under the FAA, the question becomes whether agreements containing such provisions are unenforceable on any other ground. Neither Mattel nor its *amici* identify any defenses which would render legal-error review provisions unenforceable as a matter of contract law. Instead, they argue that allowing parties to agree to legal error as a ground for vacatur

would interfere with judicial functioning and raise questions of "constitutional doubt." Resp. Br. 36-41; American Arbitration Association ("AAA") Br. 20-21. Neither argument has merit.

As an initial matter, unlike the agreements at issue in *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281 (1917), and *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39 (1939), agreements identifying legal error as an additional ground for vacatur do not tell courts what law to apply in deciding whether to vacate an arbitration award. Such agreements simply identify legal error in an arbitral award as nonbinding and subject to judicial review. Identifying legal error as an issue preserved for judicial review does not tell courts what degree of deference the court must afford to the arbitrator in undertaking that review. *See* Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 233 (1991) ("Standards of review classically include two elements: An identification of the type of issue, and the measure of deference paid to that issue"). Instead, as argued in Hall Street's opening brief, courts will review the arbitrator's award with the degree of deference that is consistent with the court's normal judicial functions. Because courts generally apply *de novo* review to claims of legal error, for example, that standard presumably will apply when courts review arbitral awards for legal error.

An agreement preserving legal error as a ground for vacatur neither confers new authority on federal courts nor dictates their functions. Parties to such agreements merely add a contractual ground for vacatur to the statutory grounds for review under the FAA, reinstating their rights to have courts act as the final decision-maker on issues of law. *See* Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 542 n.50 (1994) ("parties to [arbitration agreements providing for judicial review for legal error] have contractually

reinstated their substantive rights, which otherwise would have been contractually waived by agreeing to arbitrate").

The constitutional arguments of Mattel and its *amici* fail because they are predicated on the erroneous assumptions that legal-error review provisions dictate court functions and allow parties to stipulate to law. *Amicus* AAA, for example, argues that allowing parties to preserve legal error as a ground for vacatur impermissibly delegates Congress's "power to make law to private parties." AAA Br. 20. As discussed above, however, such contracts neither "make law" nor delegate congressional authority to private parties. Instead, in contracting for legal-error review of arbitration awards, parties agree to preserve the authority of the courts to determine issues of law in cases under their jurisdiction.

Mattel argues that interpreting the FAA to permit parties to contract for legal-error review "raises serious constitutional doubt under Article III" because arbitrators are not subject to the control of Article III judges. Resp. Br. 40. No decision of this Court suggests that Article III judges must supervise arbitrators in order to review their decisions, much less supports a claim that such review raises grave constitutional doubt sufficient to trigger the avoidance doctrine. In *Peretz v. United States*, 501 U.S. 923 (1991), this Court rejected an argument that the use of a magistrate to preside at jury selection constituted a "congressional attempt to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts[.]" *Id.* at 937 (internal quotations and citations omitted). Such separation-of-powers concerns are not implicated by private arbitration agreements allowing legal-error review, particularly where, as here, the parties entered into the agreement in the middle of litigation, and the district court expressly approved the agreement. Moreover, if such agreements raise constitutional doubts, the same doubts would apply to administrative law proceedings and all private methods of dispute resolution not subject to the direct control of Article III judges.

III. ENFORCEMENT OF ARBITRATION AGREEMENTS PRESERVING JUDICIAL AUTHORITY TO REVIEW FOR LEGAL ERROR PROMOTES THE GOALS OF THE FAA AND ENCOURAGES ARBITRATION.

Mattel and its *amici* argue that allowing the parties the freedom to contract for legal-error review will burden courts, undermine the arbitral process, and make the United States a less attractive forum for international arbitration. None of these policy arguments has empirical support or otherwise justifies singling out arbitration contracts as unenforceable. Moreover, contrary to Mattel's and its *amici*'s claims, enforcement of arbitration agreements preserving judicial authority to review for legal error promotes the goals of the FAA and encourages arbitration.

Amicus AAA first complains that allowing legal-error review provisions will make arbitrators "likely to demand more formalized evidentiary procedures and findings of fact, and feel compelled to create a record and a reasoned decision which will withstand court review." AAA Br. 9-10. AAA misses the point. The FAA permits parties to fashion their agreements to promote greater predictability and adherence to the law.

Although arbitration historically was a method of dispute resolution that relied on industry customs and other nonlegal considerations to guide decision-making, it increasingly has become a forum for adjudicating legal rights. Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1241 (2000). This Court's decisions allowing statutory claims to be subject to arbitration are premised on the very requirement that arbitrators must follow the law. *See id.*; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) ("Having permitted the arbitration to go forward, the national courts of the United States

will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed."). As this Court has recognized, parties to arbitration agreements "do not forgo [their] substantive rights" and, instead, only submit the resolution of their dispute to "an arbitral, rather than judicial, forum." *Gilmer*, 500 U.S. at 26 (internal citation and quotation marks omitted).

Arbitrators, however, do not always feel bound to apply the law. According to one study, 90 percent of commercial arbitrators report a belief that they are free to ignore the law "whenever they thought that more just decisions would be reached by doing so." Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719-20 (1999) (internal quotation marks and citations omitted). Allowing parties to contract for legal-error review of arbitral awards is one way to protect the "important social policies" embodied in certain statutory rights, while still conserving judicial resources by promoting arbitration. *See Gilmer*, 500 U.S. at 27; *see also* Ware, 83 MINN. L. REV. at 734-35 (arguing same). The fact that legal-error review provisions may encourage arbitrators to apply the law carefully is a consideration weighing in favor of – not against – enforcing such provisions.

Mattel's and its *amici*'s arguments concerning alleged burdens on courts are similarly unpersuasive. *See, e.g.*, AAA Br. 6-12. For example, although the Fifth Circuit has permitted expanded judicial review provisions since 1995, Hall Street has been able to identify only three written district court decisions from that circuit in which a court applied such a provision in reviewing an arbitration award.[6] Even courts

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[6] *SFX Motor Sports, Inc.* v. *Chris Agajanian Presents, Inc.*, Case No. H-04-0601, 2006 U.S. Dist. LEXIS 1427 (S.D. Tex. Jan. 10, 2006); *Spinal Concepts, Inc.* v. *Curasan*, Case No. 3:06-CV-0448-P, 2006 U.S. Dist. LEXIS 63987 (N.D. Tex. Sept. 7, 2006); *Hughes Training, Inc.* v. *Cook*,

prohibiting expanded judicial review recognize that such review is less burdensome than plenary adjudications on the merits. *See, e.g.*, *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 936 n.6 (10th Cir. 2001). As Judge Kozinski observed in his concurrence approving judicial-review provisions, "enforcing the arbitration agreement – even with enhanced judicial review – will consume far fewer judicial resources than if the case were given plenary adjudication." *Lapine Tech. Corp.* v. *Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *vacated sub nom. Kyocera Corp. v. Prudential-Bache T Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *petition for cert. dismissed*, 124 S. Ct. 980 (2004). And, as Hall Street already has explained, legal-error review provisions are consistent with courts' normal judicial functions, requiring courts to undertake the same type of review that they regularly conduct in a variety of contexts. *See id.* (Kozinski, J., concurring) ("The review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts, or on habeas corpus.").

Concerns about legal-error review provisions undermining the efficiency of arbitration are misplaced. Arbitration promotes efficient dispute resolution only if parties are willing to use it. If the FAA is interpreted inflexibly to prohibit legal-error review provisions, parties who value legal certainty and adherence to legal principles in the decision-making process will simply choose to litigate their disputes in court. Allowing parties the flexibility to include legal-error review provisions in their arbitration agreements will reduce the burden on the judiciary by encouraging arbitration, particularly in complex commercial disputes. Furthermore, even assuming that judicial review for legal error may, on occasion, reduce some of the efficiencies associated with arbitration, this Court

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148 F. Supp. 2d 737 (N.D. Tex. 2000), *aff'd*, 254 F.3d 588 (5th Cir. 2001).

consistently has held that the goal of efficient and speedy dispute resolution must yield to the principal objective behind the passage of the Act: ensuring judicial enforcement of privately made agreements to arbitrate. *See First Options*, 514 U.S. at 947 ("[T]he basic objective [of the FAA] is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.") (internal citations and quotations omitted). Any alleged reduction in efficiency also will flow equally from appellate arbitral review of awards, which the AAA advocates in lieu of judicial review for legal error.

Finally, although Mattel and its *amici*, particularly *amicus* United States Council for International Business, argue that allowing parties to contract for legal-error review will discourage litigants from arbitrating claims in the United States, the opposite is true. Expanded judicial review provisions – like any other provisions governing parties' agreement to arbitrate – are a matter of contract. If parties wish to forgo such review, nothing prevents them from doing so. *See* Eric Van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review, Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157, 202-04 (2003) (stating view that parties in international arbitration will rarely use expanded review but, as with domestic arbitration, a party resisting arbitration might be amenable to such a compromise solution). Parties – such as the parties in this case – who otherwise would not arbitrate for fear of legal error by the arbitrator will be more likely to arbitrate if legal-error review from a court is available.

CONCLUSION

For these reasons and those set forth in the opening brief, the decision below should be reversed.

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IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,

v.

MATTEL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening and reply briefs remains correct.

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INTRODUCTION

On November 16, 2007, this Court directed the parties to file supplemental briefs addressing three questions concerning the existence of, and the parties' reliance on, authority outside the Federal Arbitration Act ("FAA") to enforce the judicial review provision of the parties' "Stipulation and Order Regarding Agreement to Arbitrate" (hereafter, the "Arbitration Agreement"). Pet. 4a-16a. The Court's questions implicitly recognize an important underlying fact: when the parties drafted the Arbitration Agreement and the district court entered that Agreement as its order, neither relied on the FAA as the source of the district court's authority to order arbitration or to provide legal-error judicial review of the award.

The FAA's applicability first became an issue in Mattel's initial appeal, long after the district court had reviewed the award under the terms of the parties' Agreement. Relying on *Kyocera v. Prudential-Bache Trade Servs.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *cert. dismissed*, 540 U.S. 1098 (2004), Mattel argued for the first time on appeal – and the Ninth Circuit held – that the FAA prohibited enforcement of the parties' judicial review provision. Other than claiming that the FAA prohibited its enforcement, Mattel has never challenged the enforceability of the judicial review provision in the parties' Agreement under any state or federal law or as an impermissible exercise of the district court's authority.

PROCEDURAL STATEMENT

The Arbitration Agreement at issue stems from an attempt at alternative dispute resolution in federal

court litigation. Exercising its authority under Federal Rule of Civil Procedure 16(c)(9) and District of Oregon Local Rule 16.4, the district court ordered the parties to mediate their dispute. Jt. App. 3, Docket #60. As a result of that mediation, the parties agreed to submit the remainder of their claims to arbitration in which the arbitrator's legal conclusions would be non-binding and subject to the district court's review. In reporting the outcome of the mediation to the district court, the parties stated:

> [T]he parties agreed to seek to reach an agreement by which all remaining issues in the case could be resolved through "*contract arbitration*" that would require the arbitrator to prepare written findings of fact and conclusions of law and allow for judicial review of the arbitrator's legal rulings, including conclusions of law.

Jt. App. 46 (emphasis added; footnote omitted). The parties' use of the term "contract arbitration" in that report demonstrates that they each contemplated a method of consensual case management and court-ordered dispute resolution, rather than "statutory arbitration" under the FAA.

1. After negotiating the scope of the submission to the arbitrator, the parties jointly submitted their Arbitration Agreement to the district court for approval. The court entered the Arbitration Agreement as an order. Pet. App. 4a-8a. The wording of the Agreement makes clear that neither the parties nor the court intended the FAA's judicial review provisions to apply to the arbitration.

Paragraph 1 describes the parties' agreement, stating:

> The parties ... agree to arbitrate before one

> arbitrator all remaining issues not decided previously in this case by the Court.... The arbitrator shall prepare written findings of fact and conclusions of law that may be reviewed by Judge Jones at the request of either party, as more fully described in paragraph 27 of the Rules attached as Exhibit A hereto.

Pet. App. 5a. Paragraph 27 describes the grounds for vacatur or modification of the award, providing:

> The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

Pet. App. 16a.

In addition to specifying grounds for vacatur or modification, the parties also agreed to a specific procedure for securing judicial review. Paragraph 3 of the Agreement provides that "[a]ny request for review of the arbitrator's decision will be made by motion to Judge Jones[.]" Pet. App. 6a. Paragraph 24 further specifies that "[e]ither party may request that the Court set a briefing schedule for review or modification of the [arbitrator's] decision," and "[a]ny Court review of the arbitrator's decision shall be as set forth in paragraph 27 below." Pet. App. 15a.[1]

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[1] The parties' arbitration rules do not call for arbitration under the FAA, the Oregon Arbitration Act, the rules of the American Arbitration Association or any other organization. Instead, Rule 1 specifies that "[t]he parties intend for this arbitration to be conducted . . . according to the rules of the

In sum, the parties clearly did not rely upon the FAA as the authority for their Agreement or its review. Instead, they relied on the enforceability of their Agreement as a district court order and a binding contract entered as a result of court-ordered mediation. The parties' understanding of their agreement as a binding contract is reflected in various parts of the Agreement. For example, paragraph 9 of the Agreement specifies that "[t]he parties agree that this [A]greement will bind both parties, and waive any challenge they may have to the procedures set forth in this Agreement." Pet. App. 7a. Paragraph 28 of the parties' rules for the arbitration further provides that "[t]he parties agree that no party shall contest in any court of law the arbitration rules set forth herein as contrary to any law, regulation, rule or guideline." Pet. App. 16a.

2. The parties proceeded to arbitration under their Agreement. The arbitration was conducted as a court-annexed proceeding. The parties' submissions and the arbitrator's rulings were consistently filed under the district court caption and case number. *See, e.g.*, Jt. App. 4, Docket #66, 68, 69. In addition, neither party sought a stay of the district court's proceeding, and no stay was entered.

Following the arbitration, the arbitrator issued findings of fact and conclusions of law as the Agreement required. Following the Agreement's specified procedure, Hall Street filed with the district court a motion for review of the award under paragraph 27 of the Agreement. Jt. App. 4, Docket #70. In so doing, Hall Street relied exclusively on the court's order, stating:

Federal Rules of Civil Procedure and Local Rules of the U.S. District Court for the District of Oregon." Pet. App. 9a.

> Pursuant to Paragraph 3 of the Stipulation and Order Regarding Agreement to Arbitrate entered on October 23, 2001, and Paragraphs 24 and 27 of the Rules for Arbitration attached as Exhibit A thereto, plaintiff ... hereby requests review of the Arbitrator's rulings in this matter and moves for an Order vacating, modifying and/or correcting the Arbitrator's Findings of Fact and Conclusions of Law.

Jt. App. 4, Docket #70, at 2.

3. Mattel opposed Hall Street's motion to vacate. Jt. App. 5, Docket #73. Mattel did not dispute that the court's order was the source of the court's authority to vacate. Nor did Mattel argue that the court lacked authority to correct errors of law. In fact, Mattel filed a "contingent appeal" in which Mattel itself challenged various arbitral findings of fact and conclusions of law pursuant to the agreed judicial review provision. Jt. App. 5, Docket #73, at 26-27.

Throughout its brief, Mattel – like Hall Street – relied solely on the court's order establishing the parties' Agreement as the source of authority for enforcing a contractual standard of judicial review. For example, in its opposition brief, Mattel asserted: "The parties agreed by a contract confirmed by a Court Order to the parameters of the Court's jurisdiction to review the decision of the Arbitrator[.]" Jt. App. 5, Docket #73, at 12. Mattel never suggested to the district court that anything other than the parties' Agreement governed judicial review of the award.

4. After the district court reviewed the award and concluded that it resulted from legal error, the court remanded the award to the arbitrator. Pet. App. 39a-

58a. And, after the arbitrator issued his amended award, *id.* at 59a-85a, both parties continued to rely on the Arbitration Agreement and its judicial review provision. In its motion for judicial review, Mattel challenged virtually all of the arbitrator's conclusions of law and findings of fact pursuant to the Agreement's judicial review provision. Jt. App. 8, Docket #93, at 1. Hall Street similarly identified the Agreement as governing the district court's review. Jt. App. 7, Docket #91, at 6.

5. After the district court entered the amended arbitration award as its judgment, Mattel appealed. For the first time, on appeal, Mattel invoked the FAA and argued that the FAA prohibited enforcement of the court's order effectuating the Agreement. Mattel asserted that "under the [FAA], the court had no power to reverse or remand the matters decided by the arbitrator." Jt. App. 16, Mattel's Brief (10/6/03), at 12-13.

Hall Street disputed Mattel's characterization of the court's order as an arbitration agreement under the FAA. Indeed, in its jurisdictional statement and in addressing the standard of review, Hall Street specifically disagreed with Mattel's contention that "[the Ninth Circuit Court had] jurisdiction pursuant to 9 U.S.C. § 16." Jt. App. 16, Hall Street's Brief (12/19/03), at 20. *See id.* at 27 (Hall Street "disagrees with Mattel's contention that this case arises under the FAA").

Hall Street also challenged Mattel's assertion that the FAA prohibited enforcement of the order. Hall Street pointed out that, unlike the parties in *Kyocera*, the parties here were already in litigation when they entered into the Arbitration Agreement and "[b]oth parties wanted the district court judge to retain ultimate jurisdiction to decide the case." *Id.* at 28.

Hall Street further argued that, unlike *Kyocera*, the district court here approved the parties' Agreement and entered it as an order. *Id.* at 31. Hall Street emphasized that the judicial review provision was part of an enforceable contract and court order, and that Mattel should be held to its bargain. *Id.* at 29.

Hall Street reiterated those views in its petition for rehearing en banc, expressly arguing that the judicial review provision in the Agreement was enforceable as a binding contract and court order, and stressing that neither party had relied on the FAA as the authority for the Agreement or its enforcement. Jt. App. 17, Hall Street's Petition for Rehearing En Banc (12/7/04), at 2 ("neither the parties nor the District Court intended or contemplated that the [FAA's] review provisions would have any application to the mid-litigation form of case management and disposition which occurred in this case"); *id.* at p. 9 ("[N]either the parties nor the District Court judge intended or contemplated that the 'arbitration' which occurred in this case would be governed by the FAA.").[2]

6. In its petition for certiorari, Hall Street assigned error to the Ninth Circuit's ruling that the FAA prescribed the exclusive grounds for vacating, modifying, or correcting an arbitration award. Hall

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[2] After remand, the case was litigated under the Ninth Circuit's mandate, and Hall Street argued that the arbitration award should be vacated even under the FAA's standards of judicial review. Jt. App. 19, Hall Street's Brief (2/12/06). The district court agreed, Pet. App. 127a, but the court of appeals reversed 2-1, Jt. App. 156-58. In seeking certiorari after that ruling, however, the petition was limited to whether the court of appeals' earlier ruling – that the FAA prohibited enforcement of the parties' agreed-upon and court-ordered judicial review provision – was correct.

Street framed the issue not as whether the FAA *authorizes* federal courts to enforce parties' agreements providing for more expansive judicial review, but as whether the FAA *precludes* federal courts from enforcing such agreements. *See* Pet. Br. i. Hall Street posed the question that way because the Ninth Circuit's application of the FAA is the only impediment to the district court's enforcement of the parties' judicial review provision. Hall Street has consistently maintained that the district court had ample authority to vacate and modify the arbitration award under the Agreement and the court's order approving that procedure. Hall Street merely asks this Court to set aside the FAA roadblock that the Ninth Circuit erected to the district court's enforcement of the parties' Agreement for judicial review.

ARGUMENT

The FAA provides procedural mechanisms for the enforcement and judicial review of arbitration awards governed by that Act. *See* 9 U.S.C. § 9-11. The FAA does not, however, require parties to employ its procedures. *See id.* § 9 (the court may enter judgment on arbitration award only "[i]f the parties in their agreement have agreed"); *see also* Pet. Br. 23, Pet. Reply Br. 5 (same).

In this case – other than arguing to this Court that the broad principle of enforceability under FAA § 2 supports enforcement of the parties' Arbitration Agreement – Hall Street has not relied on the FAA as authority for the district court's review of the award.[3]

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[3] Hall Street acknowledges that it has argued that the FAA could be interpreted affirmatively to authorize parties to deviate from the standards under § 10 for judicial review. *See, e.g.*, Pet.

Mattel, on the other hand, has relied solely on the FAA in arguing that the Agreement's judicial review provision is unenforceable, and the Ninth Circuit invalidated the provision on that ground alone. Any other argument by Mattel has been waived. Thus, if the FAA does not prohibit enforcement of that Agreement, this Court should reverse the judgment below.

Unless the FAA is a bar, the district court's order effectuating the parties' agreement for non-binding arbitration with legal-error review is enforceable. When parties agree to non-binding arbitration with legal-error review as their chosen means of alternative dispute resolution in the course of litigation – as the parties did here – federal courts have both statutory authority and inherent judicial power to review such an award. Moreover, when parties opt to waive review and enforcement of arbitration awards under the FAA – as the parties did here – common-law remedies remain available for enforcement of arbitration awards. The parties here relied on the enforceability of their judicial review provision as a court order and a valid contract. Hall Street has never waived its reliance on those

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Br. 23-24. But that is just the flip side of Hall Street's primary argument which consistently has been that the FAA does not *prohibit* enforcement of judicial review provisions that differ from those under § 10. Hall Street's position that the FAA does not *prohibit* enforcement is reflected in the wording of its question presented on certiorari. Pet. Br. i. That position also is reflected in Hall Street's arguments in its opening and reply brief that "Mattel has the burden to show that the FAA affirmatively prohibits arbitration agreements preserving judicial authority to review for legal error, or that such agreements otherwise are unenforceable as a matter of law." Pet. Reply Br. 3; *see also* Pet. Br. at 3 ("the FAA does not prevent courts from enforcing arbitration agreements stipulating to judicial review for legal error").

authorities in contending that the FAA does not present a barrier to the enforcement of the parties' judicial review provision.

I. AMPLE AUTHORITY OUTSIDE OF THE FAA EXISTS FOR ENFORCEMENT OF THE PARTIES' JUDICIAL REVIEW PROVISION.

A. The District Court Has Authority to Enforce the Agreement's Judicial Review Provision.

The district court had ample statutory authority outside of the FAA – as well as inherent judicial power – to enforce the Agreement's judicial review provision.

The Federal Rules of Civil Procedure ("Rules") confer upon federal courts an impressive array of tools to resolve disputes. With the parties' consent, for example, Rule 53 empowers a district court to appoint a special master to make findings of fact and recommended conclusions of law. Fed. R. Civ. P. 53(g)(3), (4). Similarly, under Rule 16, a district court has broad discretion to utilize alternative dispute resolution with the parties' consent. *See, e.g.*, Fed. R. Civ. P. 16(c)(9), (16) (authorizing court to "take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule" and authorizing court action on "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action"). As the 1993 Rules Committee noted:

> [T]he judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and *nonbinding arbitration* that can lead to consensual resolution of the dispute

without a full trial on the merits.

Fed. R. Civ. P. 16, Advisory Comm.'s Note, 1993 Amend. (emphasis added).[4] The non-binding arbitration proceedings with legal-error review that the parties and court agreed to here are comfortably encompassed within this nonexclusive list of means of avoiding "a full trial on the merits." Enforcement of the parties' agreement for non-binding arbitration with legal-error review – akin to a special-master proceeding under Rule 53 – clearly falls within the scope of the district court's authority under Rule 16.

Like the Federal Rules, Oregon's local district court rules authorize a wide range of alternative dispute resolution methods. District of Oregon Local Rule 16.4 provides that "[t]he parties may agree to pursue mediation, *or any other form of alternative dispute resolution*, at any time in the life of a civil case." D. Or. L. R. 16.4(e)(1)(A) (emphasis added).[5] By its terms, that broad authorization includes an agreement for non-binding arbitration with judicial review of issues of law.

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[4] "[I]n ascertaining [the] meaning [of the Rules] the construction given to them by the Committee is of weight." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

[5] Congress authorized district courts to enact local rules under the Rules Enabling Act of 1934. *See* 28 U.S.C. § 2071(a). In the Alternative Dispute Resolution Act of 1998 ("ADR Act"), Congress specifically directed district courts to enact local rules promoting alternative dispute resolution methods. *See* 28 U.S.C. § 651(b). Under the ADR Act, a district court may not refer cases to arbitration when more than $150,000 is in dispute, see 28 U.S.C. § 654(a), but is not prohibited from allowing parties to enter voluntary agreements to arbitrate disputes. *See* 3 *Moore's Federal Practice* § 16.53[2][d][i] (Matthew Bender 3d ed.) (discussing exemptions from mandatory ADR referrals).

Finally, this Court long has recognized the inherent power of courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *see also Chambers v. NASCO*, 501 U.S. 31, 47 (1991) (rejecting argument that Federal Rule of Civil Procedure 11 limits judicial authority to impose sanctions, stating "we do not lightly assume that Congress has intended to depart from established principles such as the scope of the court's inherent power" (internal quotation marks and citations omitted)). The district court's process in this case also is authorized under the district court's inherent authority as "an independent system for administering justice to litigants who properly invoke its jurisdiction." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (quoting *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958)). That inherent power includes the authority to utilize different tools to facilitate disposition of cases.

Federal courts, for example, have inherent authority to appoint auditors or commissioners when necessary due to the complexity of facts or the volume of evidence, to aid the judge in performing his or her duties. *See Ex parte Peterson*, 253 U.S. 300, 306-07, 312-14 (1920). Federal courts have similar authority to enter consent decrees effectuating parties' agreements. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Critically, that power extends to orders authorizing the consensual arbitration of disputes. *Heckers v. Fowler*, 69 U.S. 123, 127-29 (1865) (upholding the federal courts' inherent authority to appoint a referee to determine all issues, with the parties' consent).

Included within the federal courts' inherent powers is the authority to enforce parties' judicially-approved agreements to utilize these different tools through normal judicial processes. As this Court stated in the analogous context of consent decrees: "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew v. Hawkins*, 540 U.S. 431, 440 (2004); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (consent decree is an agreement "that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.").

Courts have routinely made consensual agreements to arbitrate enforceable as orders of the court. In *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121-22 (1924), for example, this Court explained that courts have authority to enter agreements to arbitrate as court orders to "be enforced in courts of the United States by any appropriate process." In *Heckers*, 69 U.S. at 133, this Court also entered judgment on an arbitration award "pursuant to the order of the court and the agreement of the parties" to submit the matter to arbitration.

Here, the parties entered their arbitration agreement as the result of court-ordered mediation. Jt. App. 3, Docket #60. In agreeing to arbitrate, the parties stipulated that the arbitrator's legal conclusions would be non-binding and subject to district court review, akin to a special master proceeding under Rule 53. Pet. 16a. At the parties' request, the district court entered the parties' Agreement as a court order. Pet. App. 8a.

In sum, enforcement of the parties' Agreement, entered as a court order, constitutes a permissible

exercise of the court's statutory authority and inherent judicial power.

B. The Agreement's Judicial Review Provision Is Enforceable Under Common Law.

In the alternative, the federal courts have authority to enforce the Arbitration Agreement under ordinary common law principles. At common law, a party generally brought a contract cause of action or a suit in equity to enforce or set aside an arbitration award. *Red Cross Line*, 264 U.S. at 121 ("[I]f the arbitration award has been made, effect will be given to the award in any appropriate proceeding at law, or in equity."); *see also* Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising from their Coexistence*, 46 MINN. L. REV. 819, 848-61 (1962) ("Sturges & Reckson").[6] Although courts generally declined to review arbitration awards for legal error at common law, *see, e.g.*, *Burchell v. Marsh*, 58 U.S. 344, 349 (1855), that general rule did not apply when the parties expressly agreed otherwise. *See Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) ("If the parties wish to reserve the law for the decision of the court, they may

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[6] Courts in equity had authority to enforce common-law arbitration awards without requiring parties to file suit when the parties agreed to submit the matter to arbitration during pending civil litigation. *See* Sturges & Reckson, 46 MINN. L. REV. at 849 ("There is an exception to [the requirement of filing suit for enforcement of an arbitration award] in most jurisdictions when the matter in dispute in a pending civil litigation is submitted to arbitration by adequate agreement of the parties. By this exception the award, though not complying with any arbitration statute, can be returned to the court for entry of judgment thereon unless the award is set aside for cause.").

stipulate to that effect in the submission; they may restrain or enlarge its operation as they please."); *see also* Pet. Reply Br. 3; Oral Arg. Tr. 45:3-9; 47:14-18 (counsel for Mattel) ("[The FAA] still let the parties have the review through common law if they want it.").[7]

Here, the parties entered into a contract providing that the district court "shall vacate, modify or correct any award" that contains legal error. Pet. 16a. It is undisputed that the parties' agreement was voluntary and otherwise valid as a matter of contract law. As such, the parties' judicial review provision is enforceable at common law.

II. IN MAKING AND ENFORCING THEIR AGREEMENT, THE PARTIES RELIED ON THE DISTRICT COURT'S CASE MANAGEMENT AUTHORITY AND THE COMMON-LAW.

When they entered into their Arbitration Agreement, the parties clearly did not view that Agreement as restricted or governed by the FAA's

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[7] The FAA supplements common-law remedies to confirm, vacate, or modify arbitration awards. *See* Sturges & Reckson, 46 MINN. L. REV. at 826 ("There is near consensus of American decisions on the precise point that the arbitration statutes of different jurisdictions do not displace common-law arbitration. The statutes are regarded as adding another method of arbitration. Parties may choose one or the other." (footnote omitted)); *see* Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, 1 *Federal Arbitration Law* §5.5, at 5:15 (1994) (same). *See also Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration"). Arbitration awards also were enforceable at law or equity as a matter of Oregon common law. *Jacob v. Pac. Exp. Lumber Co.*, 297 P. 848, 856 (Or. 1931).

judicial review provisions. In reporting that their court-ordered mediation resulted in an arbitration agreement, the parties specifically informed the court that they had agreed to "contract arbitration" – as opposed to statutory arbitration – and they expressly retained the court's authority to review the legal issues decided. Jt. App. 46. By entering into a binding agreement for "contract arbitration," the parties plainly understood that remedies for enforcement of the parties' agreement for judicial review existed outside of the FAA.

The terms of the Agreement also reflect the parties' reliance on the district court's authority under Rule 16 and Oregon Local District Court Rule 16.4 – as well as the court's inherent power – to allow non-binding arbitration as a tool to promote efficient resolution of the parties' case. Indeed, the Agreement was the product of the district court's order to mediate under Rule 16. Although the parties did not settle their entire dispute, the Arbitration Agreement was a settlement agreement that submitted the remainder of the claims to non-binding arbitration with legal-error review. In asking the district court to make their settlement agreement a court order, the parties clearly understood that the district court had the authority to enforce its own order as it would a consent decree. Indeed, botl. Mattel and Hall Street cited only the district court's order in asking the court to review the arbitrator's legal conclusions (and, in the case of Mattel, some of the arbitrator's findings of fact). *See* Jt. App. 5, Docket #73, at 26-27; Jt. App. 4, Docket #70, at 2.

III. PETITIONER HAS NOT WAIVED RELIANCE ON AUTHORITY OUTSIDE OF THE FAA FOR ENFORCING THE JUDICIAL REVIEW PROVISION OF THE ARBITRATION AGREEMENT.

A review of Hall Street's arguments throughout this litigation makes clear that Hall Street never waived its reliance on authority outside of the FAA for the enforcement of the Agreement's judicial review provision. Indeed, the opposite is true. Before this Court, Hall Street primarily has invoked the FAA – specifically, § 2 – for the proposition that the parties' judicial review provision is an enforceable contract which may not be invalidated simply because it appears in an arbitration agreement. *See, e.g.*, Pet. Br. 21-22; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (§ 2 prohibits "singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts" (internal citation and quotation marks omitted)). In arguing that the FAA does not bar enforcement of the Agreement's judicial review provision, Hall Street has consistently claimed that this provision is enforceable as a valid contract and district court order. *See, e.g.*, Pet. Br. 14.

Hall Street's arguments before the lower courts reflect that same focus. Mattel's assertions to the contrary are contradicted by the record.

Mattel asserts – without record citation – that "the relief that [Hall Street] sought and initially received from the district court . . . was vacatur under Section 10 of the arbitrator's original award and entry of a modified award under Section 11 in its favor." Resp. Br. 43. Mattel also claims – again, without record citation – that Hall Street seeks vacatur and

modification "in a cause of action under Section 9 to confirm an award." *Id.* Both statements are wrong.

Before the district court, Hall Street – like Mattel – cited only paragraphs 24 and 27 of the parties' "Rules of Arbitration" as the authority for the district court to review and vacate the original arbitration award. It did not seek vacatur under § 10. Jt. App. 4, Docket #70, 71. Hall Street also never brought a "cause of action under Section 9" to confirm the arbitration agreement. Hall Street sought judicial review and vacatur of the award only under the district court's order effectuating the Arbitration Agreement. *Id.* At no point before the district court did Mattel ever challenge the district court's authority to enforce its own order.

After the district court reviewed and vacated the initial award, Mattel appealed. In that appeal, Mattel argued only that the FAA prohibited the enforcement of the parties' judicial review provision. Jt. App. 16, Mattel's Opening Brief (10/16/03), pp. 12-13. In opposing that view, Hall Street asserted that the judicial review provision was subject to enforcement as a court order effectuating the parties' contract. Jt. App. 16, Hall Street's Answering Brief (12/19/03), p. 20. Hall Street specifically disclaimed reliance on the FAA's judicial review provisions, stating "there is no question but that neither the parties nor the District Court intended or contemplated that the [FAA] review provisions would have any application to this mid-litigation form of case management and disposition which occurred in this case." Jt. App. at 17, Hall Street's Petition for Rehearing En Banc (12/7/04), at 2. For its part Mattel never argued to the Ninth Circuit that the judicial review provision was unenforceable for any reason other than the FAA. And, that was the sole

ground for the Ninth Circuit's vacatur of the district court's judgment. Jt. App. 141-42.

After remand, the district court concluded that the arbitration award was subject to vacatur under § 10. Pet. App. 127a-128a. Mattel again appealed to the Ninth Circuit. Because the Ninth Circuit already had ruled that enforcement of the parties' judicial review provision was barred by the FAA (making that ruling the law of the case), Hall Street did not pursue this point on Mattel's second appeal. But, Hall Street's arguments, made in the first appeal to the Ninth Circuit, preserved those arguments for this Court's review and demonstrate that Hall Street did not rely on the FAA to enforce the award, but instead relied on other grounds. *See Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (on review, this Court "consider[s] all of the substantial federal questions determined in the earlier stages of the litigation[,] for it is settled that [the Court] may consider questions raised on the first appeal, as well as those that were before the Court of Appeals upon the second appeal." (internal quotation marks and citations omitted)).

After the Ninth Circuit again reversed the district court's judgment, Hall Street filed its petition for writ of certiorari. Mattel claims that Hall Street "fram[ed] the question [presented to this Court] in terms of the district court's authority under the FAA" and abandoned any arguments to this Court "that the expanded review provision of this agreement to arbitrate was not governed by the FAA." Resp. Br. at 43, n. 12. Like its characterization of the proceedings below, this characterization of Hall Street's petition is demonstrably inaccurate.

Because both Mattel and the Ninth Circuit had identified the FAA as the only barrier to enforcement of the Agreement, Hall Street asked this Court to

decide whether the FAA precluded enforcement of the parties' judicial review provision. That question was predicated on Hall Street's position that the Agreement's judicial review provision otherwise was enforceable. Indeed, this is the presumption upon which the case was granted – that if the FAA did not bar enforcement of the parties' Agreement and the court's order, the Agreement and order should be enforced.

In its briefing before this Court, Hall Street consistently has claimed that the parties' judicial review provision is enforceable as a matter of the district court's authority to issue a court order effectuating that agreement. In its opening brief, for example, Hall Street argued to this Court:

> [T[he Ninth Circuit's refusal to enforce the parties' agreement in this case "place[d] an unwarranted limitation upon the power of district courts to control their own cases." . . . Just as a court might approve the use of a special master to facilitate resolution of a case, the district court here approved of the use of an arbitrator to achieve that same goal. . . . Nothing in the FAA – nor in any other substantive law – precluded the court from retaining that authority when both parties clearly and unmistakably agreed to it.

Pet. Br. 36 (citations omitted); *see also id.* at 12-13 (arguing that parties' judicial review provision is a contract subject to enforcement on the same terms as other contracts).

Mattel also contends that Hall Street waived the right to enforce the Agreement's judicial review provision outside of the FAA by failing to seek review of the Ninth Circuit's severability holding. *See* Oral

Arg. Tr. 38:11-13. But that argument puts the cart before the horse. There is no severability issue unless the judicial review provision is unenforceable. Hall Street has argued all along that the provision is enforceable under the agreement and court order, which are empowered by the Federal Rules of Civil Procedure, inherent court authority, and common-law contract and arbitration principles. The Ninth Circuit held that the FAA effectively preempts all of these sources of authority and bars the enforcement of the judicial review provision. If that ruling is incorrect, which it is for the reasons stated in Hall Street's briefs to this Court, then no issue of severability exists, and the district court properly enforced the judicial review provision by correcting the legal error in the arbitrator's award.

Throughout this litigation, Hall Street consistently has maintained that the FAA does not preclude the enforcement of the parties' judicial review provision. Because the FAA is no impediment, the district court's order effectuating the parties' agreement for non-binding arbitration with legal-error review is enforceable. The Ninth Circuit's contrary decision should be reversed.

CONCLUSION

For the reasons set forth in Hall Street's opening and reply briefs and above, the decision below should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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QUESTIONS ON WHICH SUPPLEMENTAL BRIEFING WAS ORDERED

The Court directed the parties to file supplemental briefs addressing the following questions:

(1) Does authority exist outside the Federal Arbitration Act (FAA) under which a party to litigation begun without reliance on the FAA may enforce a provision for judicial review of an arbitration award?

(2) If such authority does exist, did the parties, in agreeing to arbitrate, rely in whole or part on that authority?

(3) Has petitioner in the course of this litigation waived any reliance on authority outside the FAA for enforcing the judicial review provision of the parties' arbitration agreement?

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INTRODUCTION AND SUMMARY OF ARGUMENT

More than six years ago, the parties in this case entered into an arbitration agreement to resolve disputes then pending in a federal district court. After an arbitrator entered an award in respondent Mattel's favor, respondent applied for confirmation of the award to have the court enter the award as a judgment. Petitioner Hall Street sought to vacate the award and to have the court enter a modified or corrected award in its favor.

During the course of the subsequent district court proceedings, both parties understood respondent's effort to confirm and petitioner's effort to vacate, modify, or correct the award to be governed by the Federal Arbitration Act (FAA), which they interpreted to allow expanded judicial review for errors of law and fact. There was no suggestion that any other authority (federal or state) controlled the proceedings.

After the district court vacated the award for respondent and confirmed a modified award for petitioner, the judgment was appealed. While the appeal was pending, the court of appeals ruled in a different case that parties could not expand the grounds for judicial review under the FAA. Petitioner then attempted to distinguish this case from that new FAA precedent, but the court of appeals reversed, restoring the arbitration award in respondent's favor.

In its petition for a writ of *certiorari* to this Court, petitioner did not suggest that any law other than the FAA was implicated by this case. Indeed, petitioner relied on the fact that the FAA governs

this case to assert that the decision below was in direct conflict with decisions of other circuits, which also had not relied on any authority other than the FAA. It is far too late for petitioner to contend that there is some alternative authority that may give life to the judicial review provision after petitioner has consistently argued that it is the FAA that does so.

Section 9 of the FAA controls this case because the parties agreed to have the arbitrator's award entered as a judgment and that provision is severable from the expanded grounds for judicial review. Only the grounds established by Congress in Sections 10 and 11 can prevent confirmation and entry of judgment under Section 9, and petitioner acknowledges that none of those grounds is applicable here.

In any event, no other authority exists in this diversity case that can support expanded grounds for judicial review of the arbitration award for errors of law and fact. Oregon state law would not enforce such a provision. And there is no authority in either federal statutes or court rules that permits a court to vacate, modify, or correct an arbitration award on grounds other than those identified by the FAA or, when Section 9 does not apply, state law.

ARGUMENT

I. THE ARBITRATION AWARD IN THIS CASE IS SUBJECT TO SECTION 9 OF THE FEDERAL ARBITRATION ACT, AND NO AUTHORITY OUTSIDE THAT ACT EXISTS TO ENFORCE THE PROVISION FOR JUDICIAL REVIEW OF ERRORS OF LAW AND FACT

A. The Parties Agreed To Have The District Court Enter Judgment On The Award Within The Meaning Of Section 9, Which Governs Regardless Of Whether Other Issues Were Resolved Through Litigation

1. Although there was litigation that had begun without reliance on the FAA, that does not alter the fact that the FAA is the basis of the authority of the court designated by the parties to confirm their arbitration award. That authority derives from Section 9 of the FAA, which governs because the parties agreed in their agreement to have judicial entry of the award as a judgment.[1]

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[1] The parties' agreement to arbitrate certain issues (rather than litigate them) met the criteria of Section 2 of the FAA, which specifically provides that a written agreement "to submit to arbitration *an existing controversy* arising out of" a "contract evidencing a transaction involving commerce" is "valid, irrevocable, and enforceable," as a matter of federal substantive law, save upon such grounds as exist in state law "at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The fact that Section 2 governs enforcement of the *agreement to arbitrate* here does not, however, determine what law governs enforcement of the *arbitration award*.

Section 9 was created by Congress to provide a streamlined action for enforcement of arbitration awards under the FAA. Prior to the enactment of the FAA in 1925, common law actions were available to enforce or vacate arbitration awards. Federal courts entertained these actions under federal common law (which governed in diversity cases during the reign of *Swift v. Tyson*, 41 U.S. 1 (1842), as well as in admiralty cases). *See Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) ("If executed—that is, if the [arbitration] award has been made—effect will be given to the award in any appropriate proceeding at law, or in equity."); *Kleine v. Catara*, 14 F. Cas. 732 (C.C.D. Mass. 1814) (Story, J.).

By 1925, many States had adopted statutes providing streamlined actions to confirm arbitration awards because common law enforcement was burdensome. At common law in most States, if a party to arbitration refused to comply with the arbitrator's award, the winning party had to rely on full-blown litigation to enforce the award, and the losing party could bring a separate action in equity to vacate the award. John T. Morse, Jr., *The Law of Arbitration and Award* 579-590, 595-596 (1872). And it was unclear whether a court could not just vacate, but modify or correct an award in these actions. *Id.* at 330. The state statutes thus established a single action for confirmation with discrete statutory grounds for vacatur of an award, and also expressly empowered courts to modify or correct awards.

In the FAA, Congress likewise did not leave the parties to rely on common law actions.[2] Instead, Congress created substantive federal actions in Sections 9, 10, and 11 of the FAA.

Congress established in Section 9 a streamlined action to permit parties to have judgment entered by a court on an award. Parties may file applications (treated as motions) instead of complaints, 9 U.S.C. §§ 6, 12, thus precluding the delay and cost associated with filing answers or motions to dismiss. *IFC Interconsult, AG v. Safeguard Int'l Partners, LLC*, 438 F.3d 298, 308 (3d Cir. 2006); Fed. R. Civ. P. 81(a)(3) (rules of civil procedure apply to proceedings under FAA "only to the extent that matters of procedure are not provided for"). Non-FAA counterclaims are not permissible. *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 931-933 (11th Cir. 1990). Rule 16, which governs scheduling conferences and other pre-trial case-management tools, does not apply to such proceedings. *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 108 n.2 (2d Cir.

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[2] In this respect, arbitration under the FAA differs from arbitration pursuant to collective-bargaining agreements. Congress granted the federal courts authority in Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, to create federal common law pertaining to arbitration provisions in such collective-bargaining agreements. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455-458 (1957); Resp. Br. 24 (discussing the *Steelworkers' Trilogy*, which established the grounds for vacating collective-bargaining arbitration awards). Similarly, federal common law governs maritime transactions due to the Constitution's grant of authority to adjudicate cases of admiralty and maritime jurisdiction. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004).

2006); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1257-1258 (7th Cir. 1992). The FAA imposes a short three-month statute of limitations to seek judicial review of an award, 9 U.S.C. § 12, thus bringing a swift answer to the question whether an award will be challenged. In addition, the FAA specifies limited grounds for vacatur, modification, or correction of an award under this action (none of which is the error-of-law ground that petitioner invokes).

2. That streamlined action applied in this case because the parties in their agreement "agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." 9 U.S.C. § 9. Paragraph 24 of the arbitration rules agreed to by the parties, which is entitled "Confirmation of Award by Judgment," states that the parties will submit the award to the district court "for the confirmation of the [arbitrator's] decision as a judgment of such court." Pet. App. 15a. That language is plainly sufficient to meet the Section 9 standard for application of the streamlined confirmation action. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 388-390 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981).[3]

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[3] Our earlier brief on the merits demonstrated that the language in the agreement that sought to expand the power of the court to vacate, modify, or correct the award on grounds not listed in the statute did not contain any express language conditioning the entry of judgment on such review. Pet. App. 15a-16a (¶¶24, 27). The court of appeals unequivocally ruled that the sentences were severable (a question of state law), *id.* at 115a, and after petitioner unsuccessfully petitioned for

(Footnote continued on following page)

In such a case, where a Section 9 application to confirm is made, the only ground for denying confirmation is where "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9. Petitioner repeatedly conceded that its claim of legal error is not a ground for vacating, modifying, or correcting as prescribed in Sections 10 and 11. Pet. Br. 13, 18-19, 20, 28.

B. If Section 9 Of The FAA Had Not Applied Here, Oregon Law Would Have Prevented Enforcement Of The Provision For Judicial Review Of The Award For Errors Of Law And Fact

In a situation where the parties to an arbitration agreement did not agree to have judgment entered upon the award (unlike the instant case, where there was such an agreement), the federal action under Section 9 would not apply. In such a case, the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, requires state law to govern unless "the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." That statute is applicable to the instant case because the underlying litigation between the parties regarding the meaning of the leases was brought by petitioner in state court under Oregon law and was properly removed to federal court solely because of the diversity of the parties.

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rehearing in the court of appeals, it abandoned that issue and did not raise it in its *certiorari* petition or in either of its briefs on the merits to this Court. Resp. Br. 9 n.2, 42.

Oregon law would not enforce a provision in an arbitration agreement permitting vacatur, modification, or correction for legal error or lack of substantial evidence. Instead, Oregon statutory law requires a court to confirm an arbitration award rendered in Oregon and to enter judgment on that award unless one of the enumerated grounds in the statute applies.

1. The Oregon Uniform Arbitration Act of 2003

The Oregon Uniform Arbitration Act (OUAA), OR. REV. STAT. §§ 36.600-36.740, enacted in 2003, currently governs arbitration awards rendered in Oregon. Under the OUAA, once "a party to an arbitration proceeding receives notice of an award," that party may seek confirmation of the award in the court for the county where the arbitration hearing was held. *Id.* §§ 36.700(1), 36.725. That court "shall issue a confirming order," *id.* § 36.700(1), and "shall" enter judgment based on that order, *id.* § 36.715(1), unless a statutory basis for vacatur, modification, or correction exists. The OUAA enumerates eight specific grounds on which an arbitration award may be vacated—the grounds are substantially similar to those allowed under the FAA. Neither error of law nor lack of substantial evidence is among them. *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 949 n.3 (Or. Ct. App. 2007).

The text of the OUAA expressly provides that it will not give effect to any alteration by parties of the grounds for judicial review of an arbitration award beyond the grounds listed in that statute. OR. REV. STAT. § 36.610(3) (parties may not waive or vary effect of grounds listed in sections 36.705 and 36.710

for vacatur, modification, or correction).[4] Consequently, it is clear that once a party seeks confirmation of an award, the OUAA requires confirmation, despite the existence of any legal or factual error, even where the arbitration agreement purports to permit vacatur or modification for such error.

There is some question, however, whether the OUAA would have applied to this case because that statute was enacted in January 2003, after the district court began its initial review of the arbitration award in this case, and the statute has complex effective-date provisions. 2003 Oregon Laws ch. 598, §§ 3, 31; 2005 Oregon Laws ch. 22, § 30. But the same result would have occurred under the OUAA's now-repealed predecessor.

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[4] This express prohibition in the OUAA against varying the grounds for judicial review of an arbitration award is based on the Revised Uniform Arbitration Act, which was adopted by the National Conference of Commissioners on Uniform State Laws in 2000. In the short time since its adoption, that Uniform Act has been enacted into law by twelve States, including five of the nine States located in the Ninth Circuit. National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Arbitration Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited Nov. 27, 2007). Thus, to the extent that the Ninth Circuit's decision in this case could be read to hold that the FAA precludes parties from relying on state laws that would permit different judicial review than that authorized under the FAA, that question has no significance in States such as Oregon and is of rapidly diminishing significance nationwide.

2. The Oregon Arbitration Act

The Oregon Arbitration Act (OAA) was enacted in 1925, *see* 1925 Oregon Laws ch. 186, and applied to an award that was the result of a written arbitration agreement where the award was rendered in Oregon. OR. REV. STAT. § 36.305 (2001); *In re Hilltop Dev. Corp.*, 745 P.2d 1221, 1223 (Or. 1987). Both of these prerequisites were met in this case.

When the OAA originally was enacted, it permitted vacatur or modification of an award for an "error in fact or law." 1925 Oregon Laws ch. 186, § 7(b). But the Oregon legislature amended the statute in 1931 to, *inter alia*, make the grounds for vacatur or modification substantially similar to those in the FAA, and did not materially alter them again. 1931 Oregon Laws ch. 36, § 3; OR. REV. STAT. § 36.355 (2001) (repealed 2004). Under those grounds, "[n]either a mistake of fact or law vitiates an award." *Brewer v. Allstate Ins. Co.*, 436 P.2d 547, 549 (Or. 1968).

The OAA's structure and Oregon case law also demonstrate that a provision to expand the grounds for vacatur, modification, or correction for legal or factual error would not be enforced. Once an arbitration award pursuant to a written arbitration agreement is properly filed with a court clerk, "judgment shall be entered" by that court on the award unless a party files one of the enumerated "exceptions," invoking a specific statutory ground for vacatur, modification, or correction of an award. OR. REV. STAT. § 36.350. Those grounds, defined in section 36.355, are "limited to a number of challenges to the integrity, conduct or procedures of the arbitrators but excluding the merits of the dispute." *Hilltop*, 745 P.2d at 1223.

The absence of judicial authority to deviate from the OAA's requirements even with the consent of the parties is reflected in *Parmenter v. Parmenter*, 828 P.2d 1050 (Or. Ct. App.), *modified*, 841 P.2d 4 (Or. Ct. App. 1992). The trial court in that case confirmed an arbitration award but, pursuant to the parties' stipulation, entered judgment directing one of the partners, rather than a partnership, to pay part of the award. *Ibid.* The court of appeals ruled that, despite the stipulation, the OAA limited the trial court's authority "to entering judgment 'according to the award.'" *Id.* at 1052 (quoting ORS § 36.365). The court of appeals held that "the parties could not" by agreement "give the court authority that it otherwise lacked." *Ibid.* Consequently, where (as here) an arbitration award results from a written agreement to arbitrate in Oregon, the OAA precluded a court from reviewing the award for legal error or lack of substantial evidence, notwithstanding the parties' agreement otherwise.

The OUAA and OAA, when they apply to an award, are the exclusive state law causes of action for confirming or vacating, modifying, or correcting that award in Oregon.[5] Thus, there is no authority

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[5] There is no common-law action available in Oregon in a case such as this because the criteria for confirmation of the award under both the OUAA and OAA were met, and thus the award "shall" be confirmed unless the statutory grounds for vacatur are applicable. When the OAA was in force, however, it "did not replace common law arbitration when the statute [did] not apply" to the award. *Hilltop*, 745 P.2d at 1224 (recognizing common-law action to enforce award derived from oral arbitration agreement). Because of the exclusivity of the expansive statutory action when it applies, it appears that the Oregon courts have not addressed whether, in a confirmation

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under governing state law for the enforcement of the parties' agreement that expanded grounds of review for legal and factual error be applied to vacate, modify, or correct the award.

C. No Federal Case-Management Or Other Authority Permitted The District Court Sitting In Diversity Here To Adopt Grounds For Judicial Review Different From Those In The FAA Or State Law

Neither petitioner nor the lower courts previously have suggested, let alone identified, any federal case-management statute or rule that empowered the district court in this case to adopt grounds for review of the arbitration award distinct from the FAA and state law. *See* Fed. R. Civ. P. 16(c)(9) (authorizing a court to take "appropriate action" with respect to "the use of special procedures to assist in resolving the dispute *when authorized by statute or local rule*") (emphasis added). The absence of such express authority to create federal grounds for reviewing an arbitration award is fatal, particularly in this diversity action.

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action not governed by the OAA or OUAA, judicial review for legal error where the parties so agreed would be permissible under the common law of Oregon.

1. The Relief Petitioner Sought In Its Complaint Excluded This Case From The Alternative Dispute Resolution Act of 1998 Which, In Any Event, Does Not Authorize A Hybrid Scheme Of Arbitration And Expanded Judicial Review Of The Award

1. The Alternative Dispute Resolution Act of 1998 (ADRA), 28 U.S.C. § 651 *et seq.*, authorizes a district court to refer certain civil actions to arbitration and have those awards enforced under a scheme distinct from the FAA. An arbitration award under the ADRA is entered as a judgment of the court unless, within 30 days after the filing of the award, a party files a written demand for a trial *de novo*. *Id.* § 657(a), (c). Upon such a demand for trial *de novo*, the action must be "treated for all purposes as if it had not been referred to arbitration." *Id.* § 657(c)(2).

This case falls squarely within the class of cases in which the ADRA prohibits a court from exercising even that circumscribed authority. The ADRA provides that a district court may not "allow the referral to arbitration" of a civil action under the ADRA even "when the parties consent," where the action is based on an alleged violation of the Constitution, jurisdiction is based on 28 U.S.C. § 1343 (regarding civil rights claims), or "the relief sought consists of money damages in an amount greater than $150,000." *Id.* § 654(a). This case comes within the last of those exclusions because petitioner sought $19.6 million in money damages. J.A. 35 (¶58). By specifically excluding these classes of cases, the ADRA reflects Congress's judgment that federal courts may not refer such cases to arbitration absent some other grant of authority.

In addition, there is nothing in the ADRA that permits the hybrid scheme petitioner invokes in this case, which did not provide for a trial *de novo*, but rather only for judicial review of the award for legal error and substantial evidence. 28 U.S.C. § 651(e) (ADRA "shall not affect title 9, United States Code").

Furthermore, under the ADRA, the arbitrator to whom the case is referred must be "certified" by the district court pursuant to standards established by that court, which must include that the arbitrator take the same oath of office taken by federal judges. *Id.* § 655(b). In light of the clear and specific safeguards for judicial control of such arbitration that Congress provided, and which were not followed in this case, the ADRA cannot serve as authority for the district court's order approving the arbitration agreement in this case.

2. Neither The Federal Rules Of Civil Procedure Nor Local Rules Authorize A Hybrid Scheme Of Arbitration And Expanded Judicial Review Of The Award

There is no authority in the federal rules of civil procedure for this hybrid scheme of arbitration and expanded judicial review of the award. Petitioner made a passing reference in its court of appeals' brief to appointment of a special master under Federal Rule of Civil Procedure 53. But what occurred here cannot be accurately described as a Rule 53 referral to a special master.

Rule 53 requires that a *court* enter an order to appoint a particular individual as a special master and specify the scope of the master's powers and duties. *Id.* at 53(a), (c).[6] In the instant case, the arbitration agreement allowed *the parties* to select the arbitrator and, by stipulation, to modify any of the duties of the arbitrator or the procedures for the arbitration and did not contemplate any direction from the court in that regard. Pet. App. 7a, 16a (¶¶6, 26).

Rule 53(e) permits parties to stipulate that the master's fact findings will be reviewed for clear error or not at all. Rule 53 does not permit the parties to challenge those findings as not "supported by substantial evidence," which is the standard that the parties purported to adopt in this case. Pet. App. 16a (¶27).

No local rule of the District of Oregon district court discusses arbitration or authorizes a hybrid model of arbitration with judicial review for factual and legal error. Oregon Local Rule 16.4 provides that parties "may agree to pursue mediation, or any other form of alternate dispute resolution, at any time in the life of a civil case," but the only orders authorized by the rules are orders directing *mediation* and orders staying proceedings pending alternate dispute resolution. The parties engaged in such court-ordered mediation, but it was unsuccessful and was completed before they entered into the agreement to arbitrate.

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[6] Rule 53 was amended in 2003 to impose additional requirements. We cite in the text the version in effect when the parties agreed to arbitration.

The arbitration agreement here purporting to establish judicial vacatur or modification of an arbitration award pursuant to the FAA based on error of law or lack of substantial evidence was thus entered bereft of any other authorization by federal law or court rule.

II. THE PARTIES RELIED EXCLUSIVELY ON THE FAA IN AGREEING TO ARBITRATION AND TO JUDICIAL REVIEW OF THE AWARD, NOT ON ANY OTHER AUTHORITY

A. The Parties' Arbitration Agreement Demonstrates That They Meant For The Arbitration Award To Be Judicially Reviewed Under The FAA

1. The first discussion of arbitration in the record of this case appears in the parties' Joint Status Report of October 15, 2001. That document, which the parties submitted to the district court shortly after court-ordered mediation failed, reveals that the idea of proceeding to arbitration was initiated by the parties themselves and *not* the district court. J.A. 46. The parties reported that they were seeking to reach an agreement "by which all remaining issues in the case could be resolved through 'contract arbitration.'" *Ibid.* They then relied on a law review article that discusses judicial review of arbitration awards *under the FAA*, including the disagreement among courts as to whether parties could direct the grounds for judicial review under the statute.

The parties thus intended to proceed under the FAA, which under then-governing circuit law permitted them to contract for judicial review for legal and factual errors despite the statutory text to the contrary.

2. Numerous passages in the parties' arbitration agreement also strongly support the conclusion that the parties relied solely on the FAA to agree to arbitrate and for judicial entry of the award as a judgment.

For example, paragraph 14 of the "Rules For The Arbitration Between Hall Street Associates, LLC and Mattel Inc.," which was incorporated as part of the arbitration agreement, specifies that "the arbitrator shall have the power granted in 9 USC Sec. 7 to compel the attendance of witnesses duly notified by either party." Pet. App. 13a. This direct reference indicates that the parties were proceeding under the FAA and that the arbitration was not initiated under any other authority. *Cf.* 28 U.S.C. § 656 (provision of ADRA governing subpoenas for attendance of witnesses at court-referred arbitration); Fed. R. Civ. P. 53(c) (describing a special master's power to conduct evidentiary hearing).

The parties also used the language of Section 9 of the FAA to specify the "confirmation" procedure for the award. Section 9 states that a court must confirm an award, subject to Sections 10 and 11, "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," and it allows the parties to "specify the court." Paragraph 24 of the parties' arbitration agreement did just that by stating: "[t]he parties will submit the [arbitrator's] decision * * * to U.S. District Court for the District of Oregon (U.S. District Judge Robert E. Jones, presiding)" for "the confirmation of the decision as a judgment of such court." Pet. App. 17a.

In paragraph 27, the parties again relied on the terminology and structure used in Section 9. They provided that, upon application by either party, the district court "may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award." Pet. App. 16a.

Indeed, other than the specific grounds for vacatur, modification, or correction of the award, there is no material difference between the confirmation action established by Congress in Section 9 of the FAA and the one set forth in the parties' agreement. That the grounds for review vary does not demonstrate reliance on a source of authority other than the FAA because such variance reflected circuit law at that time, which held that the FAA "encourage[d]" provisions for expanded judicial review. *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 890 (9th Cir. 1997).

B. The Parties' Litigation Positions In The District Court Demonstrate Reliance On The FAA

Any doubt about whether the parties relied on the FAA as the authority for their arbitration agreement and judicial entry of the award, rather than some other source of authority, is laid to rest when one examines the arguments of the parties in proceedings before the district court.

Particularly revealing is a dispute that arose in February 2002 after the arbitrator's entry of the award. The arbitration agreement provided that any request for review of the arbitrator's decision must be filed "within 15 days of the arbitrator's ruling." Pet. App. 6a (¶3). The parties disagreed about whether petitioner's motion to vacate, modify,

and/or correct the liability award was timely because it had been filed more than 15 days after the liability award was entered, but within 15 days of the arbitrator's separate attorneys' fees award. Pet. App. 47a.

Respondent expressly relied on the FAA, noted its time limits, and then explained that the parties could have (and in this case had) bargained for shorter time limits, which was allowed under the FAA. *See* Dt. Ct. Dkt. 73 at 12-13; *see also* Pet. Br. 37 (cases allowing for waiver of affirmative defense of statute of limitations). In response, petitioner nowhere suggested that this was not an action under the FAA. Indeed, petitioner relied on FAA case law, specifying that FAA case law rather than cases involving the timeliness of challenges to collective-bargaining arbitration awards should govern because "[t]he FAA applies generally to commercial arbitration *and is specifically cited in the [parties'] Rules for the Arbitration at Paragraph 14*." Dt. Ct. Dkt. 77 at 7 (emphasis added). Petitioner went on in detail, further establishing that it relied on the FAA for its request for judicial review of purported errors of fact and law, and not other authority. *Ibid.* (discussing FAA's text and commenting on absence of cases under the FAA on the timing issue).

Petitioner's clear stance that the parties' agreement for judicial review was under the FAA was repeated in the district court in January 2003. The parties, who were again before the district court after the arbitrator had ruled in petitioner's favor on remand, disputed whether the district court should affirm the arbitrator's determination that petitioner was entitled to post-award interest. Dt. Ct. Dkt. 98 at 34. Petitioner expressly relied on the FAA again,

this time to argue that such interest was appropriate because Section 9 of the FAA contemplated a streamlined action for resolution of disputes about the validity of an arbitrators' award and thus any substantial delay should be compensated for by interest. *Ibid.*

It is thus abundantly clear that, in agreeing to arbitrate and to have the arbitration award reviewed by the district court, the parties relied exclusively on the authority of the FAA.

III. PETITIONER HAS WAIVED RELIANCE ON ANY AUTHORITY OUTSIDE THE FAA FOR ENFORCING THE PROVISION FOR JUDICIAL REVIEW FOR ERRORS OF LAW AND FACT

An examination of petitioner's arguments throughout the course of this litigation reveals that whatever sources of authority other than the FAA may exist, petitioner surely has waived reliance on them.

As discussed above, both parties relied on the FAA in agreeing to arbitrate in 2001 and to have a court review the arbitration award. The district court in its initial opinion, without any objection from petitioner, relied on the Ninth Circuit's decision in *LaPine v. Kyocera* as the authority for enforcing the parties' agreement to alter the grounds of judicial review under the FAA, rather than any other source of authority. Pet. App. 46a.

LaPine v. Kyocera was later overruled by the court of appeals' *en banc* ruling in August 2003 in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003). In that case, which was subject to Section 9, the Ninth Circuit held that "private parties lack the power to dictate a broad

standard of review when Congress has specifically prescribed a narrower standard" in the FAA. *Id.* at 1000.

Petitioner made a weak attempt to avoid the consequences of the new circuit precedent in its briefing before the Ninth Circuit when it argued for the first time that this action did not arise under the FAA after all. Pet. C.A. (No. 03-35525) Br. 27. Petitioner suggested that this arbitration was something different—a mere exercise of the district court's "case management" authority akin to the appointment of a special master. Pet. C.A. (No. 03-35525) Pet. for Reh'g 9-10. This argument bore no relationship whatsoever to any previous argument of petitioner and ran directly contrary to the various arguments it had already made.

In any event, petitioner abandoned even that position when it came to this Court. Petitioner made no mention in its petition for a writ of *certiorari* of a court's authority to appoint a special master nor any other case management authority of the district court that could have explained the proceeding below in this case. Of course, in light of petitioner's attempt in the court of appeals to argue that it was *not* relying on the FAA, its decision to base the *certiorari* plea on the contention that the FAA itself permits the parties to contract for "expanded judicial review," Pet. 12, could not have been anything other than a knowing strategy decision.

Nor did petitioner challenge the Ninth Circuit's holding that the grounds for judicial review were severable from the agreement to have the arbitration award enforced under the FAA. *See supra* note 3.

Petitioner's *certiorari* petition focused *only* on the scope of the FAA itself—specifically, whether the FAA prescribes default standards of review that can be varied by agreement or whether the FAA establishes the exclusive bases upon which a federal district court can vacate or modify an arbitration award issued after an arbitration proceeding under the FAA. Two paragraphs of the "Statutory Framework" section of the *certiorari* petition, Pet. 2-3, discuss the very statutory sections that petitioner now would be required to contend do not apply (9 U.S.C. §§ 9, 10, 11). And the petition expressly invokes the "body of federal substantive law of arbitrability" that the FAA creates. Pet. 3 (internal quotation marks and citation omitted). No other source of authority for enforcement of any aspect of the arbitration agreement or judicial review of the award is mentioned.

The *certiorari* petition also vigorously asserted that the decision below "directly conflicts" with the decisions of various other federal courts of appeals regarding whether the FAA permits district courts to review arbitration awards applying whatever standards the parties negotiated in the arbitration agreement. Pet. 12. In none of those cases was the arbitration agreement entered during the course of litigation. Thus, the very point that could have made this case unique was abandoned by petitioner in order to establish a ground for this Court's review. Indeed, the petition asserts that the FAA was intended to establish a "uniform federal substantive law of arbitration" and ominously describes the fractured decisions of the circuit courts. *Ibid.* Erasing all doubt that petitioner sought to present the instant case as anything other than the ideal vehicle for this Court to address "the current and

deepening split between the circuits on the validity of expanded judicial review *under the FAA*," the petition asserts that "[t]he widespread disagreement between the federal courts of appeals on an issue of such fundamental importance *under a federal statute* which has as its goal the creation of a uniform law of arbitration warrants review by this Court." *Ibid.* (emphasis added).

This was the thrust of petitioner's merits briefing and oral argument as well. Petitioner argued that the grounds in Sections 10 and 11 of the FAA were default provisions that could be varied by the parties to an arbitration agreement so that an award could be vacated or modified under the FAA on grounds not identified by Congress. *See, e.g.*, Pet. Br. 16, 18-20, 24-25, 38; Pet. Reply Br. 1-2, 6, 9; Oral Arg. Tr. 66 ("we are allowed to add to Section 10"). This was also the view of their *amici*. *See* Pacific Legal Foundation Br. as *Amicus Curiae* 2, 14; New England Legal Foundation, *et al.* Br. as *Amici Curiae* 8.

It was only in response to questions at oral argument before this Court that petitioner's counsel first appeared to suggest that the parties' judicial review provision might be enforced through some other, unidentified authority apart from the FAA. That assertion is far too late, too vague, too contrary to petitioner's prior positions throughout this litigation, and, in any event, is baseless, because as established above, no other source of legal authority (state or federal) applies.

CONCLUSION

For the reasons set forth above, and in respondent's earlier brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

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HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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ARGUMENT

Petitioner's attempt to recast the arbitration agreement in this case and its provision for expanded judicial review as based on anything other than the Federal Arbitration Act (FAA) is without foundation.

The FAA was the only source of authority referenced by the parties in their arbitration agreement. The FAA was the only authority noted by the district court when it exercised the purported review for legal error at issue here and vacated the initial arbitration award, by citation to *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997). *LaPine* was the then-governing circuit interpretation of the FAA that allowed parties to an arbitration agreement to alter the scope of judicial review under the FAA and it did not discuss any authority other than the FAA.

Thus, petitioner is wrong in its bold assertion (Pet. Supp.Br. 1, 6) that the FAA was invoked for the first time only after the court of appeals reversed *LaPine en banc* in *Kyocera Corp. v. Prudential-Bache Trade Services*, 341 F.3d 987 (9th Cir. 2003), *cert. dismissed*, 540 U.S. 1098 (2004). Indeed, the ruling in *Kyocera* is what led *petitioner* to attempt to change course and to distinguish this case somehow from the FAA, but that was unsuccessful and short lived.

Petitioner's *certiorari* petition expressly urged that this Court reject the *en banc Kyocera* interpretation of the FAA on which the court of appeals relied, Pet. 23, and follow instead the earlier interpretation of the FAA in *LaPine* on which the district court relied, and which petitioner itself

recognized as "approv[ing] expanded judicial review *under the FAA*." Pet. 26 (emphasis added). Petitioner did not suggest that there was any source of authority other than the FAA for the judicial review it sought.

I. PETITIONER INVOKES NONEXISTENT LEGAL AUTHORITY AND DISREGARDS THE FEDERAL AND STATE SUBSTANTIVE LAW THAT, IN THIS CASE, PROHIBITED JUDICIAL REVIEW OF THE ARBITRATION AWARD FOR LEGAL OR FACTUAL ERROR

A. Petitioner Identifies No Statute Or Court Rule That Authorized The District Court's Vacatur Of The Award Under The Parties' Hybrid Scheme Of Arbitration And Judicial Review For Legal Or Factual Error

Petitioner broadly asserts (Pet. Supp.Br. 10) that the district court had "ample statutory authority" to review the arbitration award for legal error. Petitioner cites only the Alternative Dispute Resolution Act (ADRA) and the Rules Enabling Act, however, and neither of them provided such authority. And as demonstrated in our earlier brief on the merits, the FAA did not provide such authority because the grounds for refusal to confirm an award and to vacate, modify, or correct are limited to those explicitly set forth by Congress in Sections 9, 10, and 11 of the FAA.

1. The ADRA directs district courts to adopt local rules to authorize alternative dispute resolution (ADR), "except that the use of arbitration may be authorized only as provided in section 654." 28

U.S.C. § 651(b). As petitioner concedes, Section 654 provides that a district court, even with the parties' consent, "may not refer cases to arbitration when more than $150,000 is in dispute." Pet. Supp.Br. 11 n.5. Because that amount was exceeded here, the ADRA would not have permitted the adoption of a local rule authorizing judicial review of an arbitration award for legal error governing this case.

Petitioner's citation to the Rules Enabling Act disregards the fact that the statute allows a court to prescribe local rules only to the extent the rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As we demonstrate below, the grounds for review of an arbitration award are substantive and thus cannot be modified by rule.

2. The single local rule on which petitioner relies, Oregon Local Rule 16.4(e)(1)(A), did not authorize the district court in this case to vacate the arbitration award for legal error. That rule allows parties to agree to ADR, but the rule grants authority to a court only to "refer any civil case to mediation," "designate a mediator," and "stay" litigation pending ADR. *Id.* at 16.4(e)(2)(A), (f)(1)(D), (i).

Similarly, Federal Rule of Civil Procedure 16(c)(9) contemplates ADR "when authorized by statute or local rule." Those words "are a frank limitation on the district courts' authority to order [ADR] thereunder," and federal courts "must adhere to that circumscription." *In re Atlantic Pipe Corp.*, 304 F.3d 135, 142 (1st Cir. 2002).

Petitioner's repeated description of the arbitration here as "non-binding," Pet. Supp.Br. 2, 9, 11, 13, 16,

21, is an apparent attempt to invoke a reference in the Advisory Committee Note to Rule 16, to "nonbinding arbitration" as something a judge can "explore." But the parties in this case agreed to *binding* arbitration—they unequivocally (and in the language of Section 9 of the FAA) agreed that the award would be submitted to the district court for confirmation and entry of judgment. Pet. App. 15a (¶24). As petitioner earlier explained: "If no party contests the award or if the court finds neither legal error nor any statutory or common-law ground for vacatur, the award 'settles' the dispute." Pet. Reply Br. 7. The award, even if never submitted for confirmation, has binding *res judicata* effect unless vacated or modified. *Rueda v. Union Pac. R. Co.*, 175 P.2d 778, 790 (Or. 1946); 4 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 39.6 n.4 (1994) (collecting cases from other jurisdictions).

B. Federal Common Law Has No Role Here Because The Grounds For Vacatur Of An Arbitration Award Are Substantive Law Under *Erie* So If The FAA Did Not Govern, State Law Would

Petitioner's invocation of "common law" is perplexing. Pet. Supp.Br. 14-16. It cannot be read to refer to Oregon common law because petitioner buries at the end of a footnote its single citation to an outdated Oregon decision. Whatever may have been the situation earlier, or is the situation today in other States, the Oregon statutory regime that would govern enforcement of this arbitration award—if Section 9 of the FAA did not—would not

enforce the severable provision permitting review for legal error. Resp. Supp.Br. 7-12.[1]

Instead, petitioner seeks refuge in older federal cases to argue that "ordinary" common law "principles" permit enforcement of the judicial review provision. But to say that there is no general federal common law would seem unnecessary as we approach the seventieth anniversary of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Under *Erie*, the enforcement and judicial review of arbitration awards is substantive law so that where the FAA (or the ADRA or another federal statute or rule) does not control, it is state statutes and state common law that govern the issue, not federal common law. As explained in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995), this Court's repeated holdings that the FAA is substantive law that must be applied by both federal and state courts when applicable, rather than

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[1] Contrary to petitioner's claim (Pet. Supp.Br. 9), respondent did not waive any opposition under Oregon law to new positions taken by petitioner. As petitioner acknowledged, it never previously attempted to rely on Oregon law in this case to justify enforcement of the judicial review provision and vacatur of the award. Oral Arg. Tr. 14:6-20. To the extent petitioner suggests (Pet. Supp.Br. 15) that respondent agreed at oral argument that the provision could be enforced under Oregon common law, it is mistaken. Respondent noted only that in circumstances where Section 9 of the FAA does not apply, state common law actions to enforce awards might be available in some States. Oral Arg. Tr. 34:23-35:1, 44:15. To the extent petitioner implies that respondent endorsed development of *federal* common law, that is contrary to counsel's statement that the application of federal common law would be "antithetical" to the FAA. *Id.* at 59:15.

procedural law applicable only in federal courts, is derived from the post-*Erie* case of *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). *Bernhardt* held that if an arbitration agreement falls outside the FAA's scope (*e.g.*, it does not involve commerce), then state law governs a federal district court's decision whether the agreement is enforceable in a diversity case. *Id.* at 202-203. *Bernhardt* reasoned that "the remedy by arbitration," including the grounds for "judicial review of an award" "substantially affects the cause of action created by the State." *Id.* at 203.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996), confirms that the grounds for judicial review of an arbitration award are substantive law for purposes of *Erie*. *Gasperini* held that a state law that provided a judicial standard for review of the amount of a jury's damage award applied in a federal court sitting in diversity because the State had adopted its standard to reduce the risk of excessive damage awards. *Id.* at 429-430. If federal diversity courts did not apply the state standard of review, this Court held, there would be "'substantial' variations" between the results in state and federal courts, thus violating the "twin aims" of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 428, 430.

Different standards in federal and state courts for judicial review of arbitration awards not enforced under the FAA would lead to the same problems. Arbitration "awards can become no better by going into federal court to enforce them than they would be in the State Courts." *Tejas Dev. Co. v. McGough Bros.*, 165 F.2d 276, 279 (5th Cir. 1947).

C. Petitioner's Invocation Of "Inherent Authority" Disregards The Strict Limits Accompanying That Extraordinary Authority

Petitioner erroneously suggests that apart from either state or federal law, review of an arbitration award for legal error may be based on a court's "inherent authority." Pet. Supp.Br. 12-13.

"A court's inherent power is limited by the *necessity* giving rise to its exercise." *Degen v. United States*, 517 U.S. 820, 829 (1996) (emphasis added). There is no necessity here because Congress has provided for enforcement of arbitration awards in federal court under federal and state substantive law, authorized referral of certain cases for other types of ADR, and granted other case management authority to the federal courts.

Petitioner's reliance (Pet. Supp.Br. 12-13) on *Heckers v. Fowler*, 69 U.S. 123 (1865), is misguided. Referral to arbitration and enforcement of the award in *Heckers* was not based on inherent authority but on an explicit congressional delegation of authority that is lacking in this case. *Heckers*'s recognition that federal courts "have authority to make and establish all necessary rules for the orderly conducting [of] business" was a word-for-word quotation (albeit without quotation marks) of the Judiciary Act of 1789, the then-effective statutory grant of authority to the federal courts. Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure*, 11 HOFSTRA L. REV. 997, 1004 n.30 (1983).

In addition, since Congress adopted the Rules Enabling Act to authorize the promulgation of rules of procedure, this Court has repeatedly held that federal courts lack "inherent authority" "to develop rules that *circumvent or conflict* with" those rules or with federal laws. *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (emphasis added).[2] Petitioner's invocation of "inherent authority" is an attempt to do just that because it seeks to circumvent the limited grounds for judicial review of an arbitration award specified by Congress.

Petitioner's analogy to a federal court's power to enter and enforce a consent decree is also flawed. A court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Railway Employees v. Wright*, 364 U.S. 642, 651 (1961). There was no federal statute here that could have given rise to authority to vacate the arbitration award for legal error because the underlying lease dispute was a state contract action. In *Frew v. Hawkins*, 540 U.S. 431, 437 (2004), this Court made clear: "Consent decrees entered in federal court must be directed to protecting federal interests." Even where federal interests are involved, a district court may not approve a consent decree that exceeds or supplants state law except to remedy a federal law violation. *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997).

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[2] Likewise, in *Ex parte Peterson*, 253 U.S. 300 (1920), when the Court permitted (prior to now-governing Rule 53) the appointment of a special master to submit a report that was "essential" to the jury's function in a particular case, the Court did so only because there was no federal law or rule "which directly or by implication" forbade it. *Id.* at 312.

II. THE PARTIES' AGREEMENT AND THEIR COURSE OF CONDUCT BELOW REFLECT THEIR RELIANCE ONLY ON THE FAA AND NOT ON SOME OTHER UNNAMED SOURCE OF AUTHORITY

The FAA was not invoked for the first time on appeal as petitioner claims. Pet. Supp.Br. 1, 6. The arbitration agreement specifically cited Section 7 of the FAA; it included language that tracked the entry-of-judgment requirement of Section 9 of the FAA; and both petitioner and respondent relied on the FAA in their arguments to the district court on various points of law. Resp. Supp.Br. 18-20. Of course, the parties also referenced the agreement itself as petitioner emphasizes, Pet. Supp.Br. 5-6, 16, 18, but that is consistent with the fact that the agreement was under the FAA, and petitioner cites nothing by the parties stating otherwise.

The district court never mentioned in its orders or opinions any of the purported authority on which petitioner now seeks to rely. To the contrary, as petitioner itself explained in its *certiorari* petition, the district court approved the agreement "in reliance on the Ninth Circuit's prior holding in *LaPine*, which approved expanded judicial review *under the FAA*." Pet. 26 (emphasis added); Pet. App. 46a (district court opinion relying solely on *LaPine* as its authority to vacate the award).

Petitioner even declared unequivocally in its reply brief at the *certiorari* stage that it had "clearly contended throughout the first appeal that the expanded judicial review provision was enforceable under the FAA." Pet. Reply 3.

Petitioner now cites (Pet. Supp.Br. 2, 16) the parties' initial description of the arbitration agreement as "contract arbitration" to argue that it was not "statutory arbitration" under the FAA. But the footnote appended directly to the term "contract arbitration" cites a law review article which was the source of that phrase and which makes clear that "contract arbitration" refers to arbitration under the FAA (which the article believed could include review for legal error) and is more formal than some other arbitrations under the FAA that the article describes as "folkore arbitration." J.A. 46 n.1 (citing Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TULANE L. REV. 39, 65-76 (1999)). The article nowhere provides support for petitioner's attempt to move such arbitration or review outside of the FAA.

III. PETITIONER HAS WAIVED RELIANCE ON ANY AUTHORITY OUTSIDE THE FAA

Petitioner's *certiorari* petition (and the related reply brief) contains no argument that when the district court refused respondent's request to enter judgment on the award and granted petitioner's request for vacatur and modification, the court exercised any of the purported non-FAA authority that petitioner now invokes. To the contrary, the passages earlier discussed, Resp. Supp.Br. 22-23, disprove petitioner's contention in its supplemental brief.

Moreover, petitioner admits that it argued in its merits brief that it should prevail because the FAA could be interpreted to authorize parties to alter the grounds for vacatur listed in Section 10 of the FAA. Pet. Supp.Br. 8-9 n.3.

The objections raised by petitioner in its supplemental brief (Pet. Supp.Br. 17-18, 19), to the characterization in respondent's merits brief of the proceedings below as being under the FAA, ring hollow in light of petitioner's notable failure to make any such objection in its merits reply brief.

Indeed, petitioner now confuses the issue when it asserts that it, Hall Street, "never brought a 'cause of action under Section 9' to confirm the arbitration agreement." Pet. Supp.Br. 18. Well, of course it did not. The initial arbitration award was adverse to petitioner and it had no interest in a court confirming the award. It was respondent who requested that the court enter judgment on the award, J.A. 51 (¶1), under the agreement's provision that was rooted in the language of Section 9. Pet. App. 15a (¶24).

Petitioner also waived any argument for vacatur or modification of the arbitration award through any type of new court action apart from the FAA when petitioner failed to preserve its severability argument. The court of appeals ruled that the provision for judicial review of legal error was invalid under the FAA and was severable under Oregon law from the remainder of the agreement that made the award enforceable under Section 9 of the FAA. Thus, the court of appeals' order to the district court to enforce the original arbitration award in favor of respondent was appropriate because petitioner failed to establish vacatur or modification on the grounds identified in Sections 10 and 11. To the extent petitioner now invokes (erroneously in our view) authorities on which it could attempt to pursue some type of new suit to try to vacate the award, affirmation of the judgment by

this Court on FAA grounds would foreclose such an action because the federal court is bound to enter judgment on the initial award under Section 9.

Finally, in light of petitioner's argument in its supplemental briefing that the district court's vacatur of the initial arbitration award was based exclusively on something other than the FAA and not even in part on the FAA, Pet. Supp.Br. 4-5, 8, 15-16, 18, it has abandoned any argument under the FAA. Because the important federal statutory question whether parties may alter the standards enumerated by Congress in Sections 10 and 11 of the FAA is no longer pressed by petitioner, dismissal of the writ as improvidently granted in this case would be appropriate.

CONCLUSION

For the reasons set forth above and in respondent's earlier briefs, the judgment of the court of appeals should be affirmed or the writ dismissed.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening, reply and supplemental briefs remains correct.

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INTRODUCTION

Mattel asserts that this case involves an application to confirm or vacate an arbitration award under §§ 9-11 of the Federal Arbitration Act ("FAA"). Based on that premise, Mattel asserts that (i) the FAA provides the exclusive grounds for vacatur, and (ii) if it does not, state law applies and bars enforcement of the Arbitration Agreement's judicial-review provision. Mattel is wrong in all respects.

This is not a proceeding for confirmation and judicial review under FAA §§ 9-11. Neither party ever moved for confirmation under § 9. Instead, this case is a federal district court action in which the court entered as its order the parties' stipulation to arbitrate certain issues with legal-error review. The court entered and enforced that order pursuant to its authority under the Federal Rules of Civil Procedure ("Federal Rules"), the District of Oregon Local Rules ("Local Rules"), and its inherent authority. Had the district court needed additional power, federal common law – not state law – governs and mandates enforcement of the judicial-review provision. And even if state law applies, the judicial-review provision still is enforceable.

The Ninth Circuit refused to enforce the court's order implementing the judicial-review provision only because the Ninth Circuit viewed the FAA as prohibiting such agreements. Because the FAA is no impediment, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. AMPLE AUTHORITY EXISTS OUTSIDE THE FAA TO ENFORCE THE AGREEMENT'S JUDICIAL REVIEW PROVISION.

A. The FAA Does Not Limit Courts' Authority To Enforce Agreements For Judicial Review Of Arbitration Awards.

In its supplemental brief, Mattel again urges this Court to conclude that the FAA prohibits judicial review of arbitration awards beyond the grounds prescribed under §§ 10 and 11. The premise of Mattel's argument is that this case is a proceeding to enforce or vacate an award under the FAA. That premise is wrong. Moreover, Mattel has failed to establish that the FAA imposes any such prohibition.

At oral argument, Mattel conceded that nothing in the FAA prohibits the enforcement of legal-error review provisions. Oral Arg. Tr. 45:3-9; 47:14-18 (counsel for Mattel) ("[The FAA] still let the parties have the review through common law if they want it."). Mattel now contends, however, that the FAA prohibits legal-error review whenever parties agree that a judgment may be entered on an arbitration award. Resp. Supp. Br. 6-7. Citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932), Mattel argues that any agreement for entry of judgment is necessarily an agreement for confirmation under § 9. Resp. Supp. Br. 6. But *Marine Transit* does not support that proposition. In *Marine Transit*, this Court concluded that the parties agreed to confirmation under § 9 because the "agreement for arbitration stipulated that the award should be 'final and binding.'" *Id.* at 276. Here, the parties expressly stipulated – and the court ordered – that the award would *not* be final and binding, but instead subject to

the district court's review for legal error. Pet. App. 15a-16a, ¶¶ 24, 27. In effect, the parties opted out of §§ 9-11.

Mattel urges this Court to disregard the unambiguous Agreement and court order because the judicial-review provision is severable. *See* Resp. Supp. Br. 6 n.3. But the Ninth Circuit severed the Agreement's judicial-review provision only because it erroneously concluded that the FAA prohibits parties from agreeing to arbitration with legal-error review. *See* J.A. 141. No severability issue exists unless the judicial-review provision is unenforceable.

The judicial-review provision is enforceable. The FAA does not confine parties to the enforcement and judicial-review provisions under §§ 9-11. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989) (FAA does not reflect congressional intent to occupy entire field of arbitration); *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953) (discussing benefits of arbitration under FAA "or on standards otherwise created"), *overruled on other grounds by Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Parties may agree to – and courts may enforce – arbitration under different terms, including arbitration that is non-binding on legal issues. Pet. Br. 16-30; Pet. Reply Br. 3-14. *See also, e.g., Ky. River Mills v. Jackson*, 206 F.2d 111, 120-21 (6th Cir. 1953) (common-law enforcement). Even the grounds for vacatur under the FAA are supplemented by federal common law, such as the manifest disregard of the law and public policy exceptions. Pet. Br. 24-25.

In this case, the parties clearly conditioned confirmation of the award upon judicial review for legal error. The FAA does not bar enforcement of that agreement.

B. The Judicial Review Provision Is Enforceable As A Matter Of Federal Law.

Mattel argues that if the FAA does not prohibit enforcement, state law governs whether the Agreement is enforceable under the Rules of Decision Act ("RDA"), 28 U.S.C. § 1652. *See* Resp. Supp. Br. 7. Mattel is incorrect.

1. The district court had authority to enforce the Agreement's judicial-review provision under Federal Rule 16, Local Rule 16.4, and the court's inherent powers. Pet. Supp. Br. 10-14. The Rules Enabling Act ("REA"), 28 U.S.C. § 2072, commands that those federal rules – rather than state law – apply so long as the rules are constitutional and a valid exercise of this Court's authority under that statute. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *see Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987); *People by Abrams v. Terry*, 45 F.3d 17, 23 (2d Cir. 1995) (rule of *Erie* does not apply to court's inherent authority to manage orderly disposition of cases).

Mattel contends that the district court lacked authority under Federal Rule 16 and Local Rule 16.4 to enforce the parties' agreement for arbitration with legal-error review. Resp. Supp. Br. 12-16. Mattel focuses on the fact that the Arbitration Agreement was not an agreement to place the case before a special master under Rule 53. *Id.* at 14-15. But Rule 53 is just one case-management tool available under the Federal Rules.

Rule 16 and Local Rule 16.4 provide district courts with broad discretion to utilize different methods of alternative dispute resolution. *See* Fed. R. Civ. P. 16(c)(9); D. Or. L. R. 16.4(e)(1)(A).

Arbitration subject to legal-error review falls within the scope of those rules. Although Mattel stresses that neither Rule expressly authorizes orders enforcing arbitration agreements, Resp. Supp. Br. 15, those Rules give district courts both the authority and the flexibility to approve and enforce parties' agreements for alternative dispute resolution through the application of normal court processes. *See Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (discussing court's inherent authority).

2. Mattel also argues that the Alternative Dispute Resolution Act ("ADRA"), 28 U.S.C. § 651 *et seq.*, prohibits district courts from referring cases to arbitration when – as in this case – the amount in controversy exceeds $150,000. That restriction does not apply here because, as Mattel acknowledges, "the idea of proceeding to arbitration was initiated by the parties themselves and *not* the district court." Resp. Supp. Br. 16. The ADRA exemplifies Congress's encouragement of alternative dispute resolution; it does not restrict parties' freedom to elect such methods as an alternative to litigation. Moreover, if Mattel were correct that the ADRA prohibits arbitration here, then the proper outcome would be to vacate the judgment of the court of appeals and remand to litigate the underlying lease dispute in the district court.

The Federal Rules, the Local Rules, and the court's inherent powers authorized the district court's order implementing the parties' agreement for arbitration with legal-error review. Acceptance of Mattel's claims to the contrary would mark an abrupt and unwarranted departure from the well-settled rule that courts

have authority to manage their own dockets "to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31.

C. Federal Common Law Applies, But The Agreement's Judicial Review Provision Is Enforceable Even If Oregon Law Applies.

Even if the Federal Rules and the district court's inherent powers were insufficient to enforce the Agreement's judicial-review provision, both federal and state common law authorize its enforcement.

1. Under the RDA, federal courts sitting in diversity apply state substantive law and federal procedural rules in the absence of a specific, guiding statute or rule. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). State laws are substantive when they are "outcome determinative" in the sense that a federal court failing to apply the state law would either (1) encourage forum shopping, or (2) cause an inequitable administration of the laws. *Hanna*, 380 U.S. at 467-68. By this standard, the judicial-review provision approved by the district court, which is litigant-neutral, is not substantive and federal law applies. *See Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 437-38 (1996) (limit on jury awards is substantive and state law applies, while standard of appellate review is procedural and federal law applies). And, as Mattel acknowledges, the federal common law of arbitration permits judicial review of arbitration awards for legal error when parties so provide. *Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) (Story, J.).

2. Even if state law governed the enforceability of the Agreement's judicial-review provision, Oregon law would not preclude its enforcement.

The standards for judicial review under the Oregon Arbitration Act ("OAA")[1] mirror the standards under FAA §§ 10 and 11. Mattel contends that the OAA prohibits parties from deviating from the statutory grounds for judicial review if the parties have agreed that a judgment may be entered on an arbitration award. Resp. Br. 10-11. This argument, like Mattel's analogous argument under the FAA, is without merit.

The Oregon Supreme Court has held expressly that Oregon's arbitration statute does not displace the common law of arbitration. *Halvorson-Mason Corp. v. Emerick Constr. Co.*, 745 P.2d 1221, 1224 (Or. 1987). Indeed, Oregon

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[1] The Oregon Arbitration Act, *former* Or. Rev. Stat. §§ 36.300 *et seq.* (2001), was repealed in 2003. 2003 Or. Laws, Ch. 598, § 57. Mattel wrongly suggests that the successor statute – the Oregon Uniform Arbitration Act ("OUAA"), Or. Rev. Stat. §§ 36.600 *et seq.* (2003) – would apply if Oregon law governs the enforceability of the judicial-review provision. Resp. Supp. Br. 8-9. This action was commenced before the OUAA's effective date. 2003 Or. Laws, Ch. 598, § 31.

Mattel also is wrong that the OUAA prohibits legal-error review of arbitration awards. The OUAA is modeled after the Uniform Arbitration Act ("UAA"). The comment to § 23 of the UAA states that "parties remain free to agree to contractual provisions for judicial review of challenged awards on whatever grounds and based on whatever standards they deem appropriate until the courts finally determine the propriety of such clauses." Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Arbitration Act*, § 23, cmt. (B)(5) (2000); *Id.* at § 4, cmt. (5)(e) (notwithstanding UAA's prohibition on waiving or varying effect of listed vacatur standards, "parties can add appropriate grounds that are not in the statute").

courts repeatedly have instructed that parties are free to "mak[e] an enforceable agreement to arbitrate outside the purview of the statute." *Kaiser Found. Health Plan v. Doe*, 903 P.2d 375, 382 (Or. Ct. App. 1995), *adh'd to as modified on recons.*, 908 P.2d 850 (1996). Indeed, in *Rueda v. Union Pacific Railroad*, 175 P.2d 778 (Or. 1946), the Oregon Supreme Court confirmed that common-law arbitration awards may be set aside for errors of law, *id.* at 788, and that parties are free to arbitrate and seek judicial review as a matter of contract. *Id.* at 791.

Moreover, a public policy must be clear and "overpowering" before Oregon courts will invalidate a contract provision on that ground. *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013, 1020 (Or. 1997). Because neither the OAA nor any other statute articulates any policy against judicial review of arbitration awards, the Agreement's judicial review provision is enforceable under Oregon common law.

II. IN AGREEING TO ARBITRATE, THE PARTIES DID NOT RELY ON THE FAA FOR ENFORCEMENT OF THEIR JUDICIAL REVIEW PROVISION.

Contrary to Mattel's supplemental arguments, the parties did not rely on the FAA for enforcement of the Agreement's judicial-review provision. The record is clear that the parties expressly *eschewed* FAA or "statutory" arbitration in favor of "contract" arbitration with legal-error review. *See* J.A. 46.

Faced with that clear record, Mattel notes that the parties, in reporting that they had reached agreement to arbitrate, cited a law review article that "discusses" judicial review under the FAA. Resp.

Supp. Br. 16. But even if such a reference could overwhelm all procedural history showing that the parties did not intend to proceed under §§ 9-11, *see* Pet. Supp. Br. 1-8, the article itself argues that judicial-review provisions are enforceable contracts not prohibited by the FAA. *See* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 84-85 (1999). The parties' citation to that article suggests nothing more than that they viewed their Agreement for non-statutory judicial review as a valid and enforceable contract.

Mattel also claims that the parties' incorporation of FAA § 7 into the Agreement is evidence that they relied solely on the FAA for enforcement of the judicial-review provision. *See* Resp. Supp. Br. 17. To the contrary, the parties' reference shows that they understood the need specifically to incorporate § 7 to provide the arbitrator with subpoena power because they were opting out of the FAA's procedural provisions.

Mattel further maintains that the parties relied solely on the FAA for enforcement of the judicial-review provision because the Agreement authorizes confirmation and entry of judgment on the award. Resp. Supp. Br. 17-18. The Agreement, however, establishes procedures which differ significantly from those prescribed under §§ 9-11. The Agreement provides that the court "may" enter judgment on the award, but "shall" vacate, modify or correct any award that contains legal error. Pet. App. 16a, ¶27. If the parties intended to rely on §§ 9-11 to authorize judicial review and enforcement of the award, they would have simply incorporated those provisions as they did § 7, or otherwise manifested their intent that

the award be "final and binding." *See Marine Transit*, 284 U.S. at 276.

Finally, Mattel argues that the parties' subsequent litigation positions reveal reliance on the FAA as the sole source of authority for enforcement of the judicial-review provision. Resp. Supp. Br. 18-20. That argument is belied by Mattel's arguments before the district court. When a dispute arose over the timeliness of Hall Street's motion to vacate, Mattel asserted:

> At its core, the arbitration procedure is a matter of contract between the parties. The parties agree upon a set of rules to govern the resolution of their dispute. Having consented to those rules, neither the parties nor the Court should rewrite the contract after the outcome is decided.

J.A. 5, Docket # 73, at 14. Although the parties cited the FAA (as well as Labor Management Relations Act arbitration cases) in arguing by analogy on issues unrelated to judicial review, the parties never asserted that §§ 9-11 governed confirmation and review of the award.

III. HALL STREET DID NOT WAIVE RELIANCE ON AUTHORITIES OUTSIDE THE FAA.

Mattel contends that Hall Street waived reliance on any authority outside of the FAA for enforcing the Agreement's judicial-review provision. Resp. Supp. Br. 20-23. Mattel's contention is predicated on its mischaracterization of Hall Street's petition for *certiorari* and the question presented.

Mattel acknowledges that Hall Street argued below that the FAA does not preclude enforcement of the

Agreement's judicial-review provision and that the arbitration occurred under the district court's Rule 16 authority. Resp. Supp. Br. 21. Mattel suggests, however, that Hall Street abandoned that position in its petition for certiorari because, according to Mattel, Hall Street asserted that "the FAA itself permits the parties to contract for 'expanded judicial review.'" *Id.*

Hall Street did not frame the question as whether the FAA "itself permits" the Agreement's judicial-review provision. Instead, Hall Street framed the question in terms of the Ninth Circuit's holding; Hall Street asked only whether the FAA precludes enforcement of the judicial review provision. Pet. Supp. Br. 7-8. Hall Street always has acknowledged that legal-error review is "more expansive" than the grounds for vacatur identified in FAA §§ 10-11. But it did not seek vacatur under the FAA; nor did the district court rely on the FAA in reviewing the arbitration award. Hall Street asked this Court to decide whether the FAA bars enforcement of the judicial-review provision. Hall Street has always maintained that, if the FAA is not a barrier, the provision is otherwise enforceable.

Hall Street also has never abandoned reliance on the district court's supervisory role and on general contract principles for enforcement of the judicial-review provision. In its "Statement of the Case" Hall Street explained that "[t]his case involves the Ninth Circuit's refusal to enforce the clear and unambiguous terms of the parties' arbitration agreement, an agreement that was entered into with district court approval after the commencement of this litigation." Pet. 2 (emphasis added); see also id. 8-9. Critically, Hall Street explained that the lower court erred in assuming that the FAA provided authority for the Agreement's enforcement:

> Nowhere does the legislative history assert that an agreement to arbitrate *must be enforced only in accordance with the FAA* or that a court is precluded from enforcing a contract on its own terms if the contract expands on the FAA's terms.

Id. 23 n.13 (emphasis added); *see also id.* 25 (characterizing the Agreement as a waiver of the procedures set forth in FAA §§ 9-11).

In sum, Hall Street never waived reliance on authority outside the FAA for enforcing the Agreement's judicial-review provision. The Ninth Circuit identified the FAA as the sole barrier to enforcement. Hall Street, accordingly, asked this Court to decide whether the FAA precluded enforcement – a question that is necessarily based on the premise that the provision was otherwise enforceable. As shown above and in Hall Street's other briefs, ample authority exists outside the FAA for enforcing the Agreement's judicial-review provision.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 06-989

IN THE

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

—v.—

MATTEL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the American Arbitration Association ("AAA"), is a not–for–profit, public service organization founded in 1926, after Congress's enactment of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. Today, the AAA is the largest provider of dispute resolution services in the world. From the time it was founded, the AAA has administered over two million domestic and international disputes arising out of collective bargaining agreements and commercial matters. The AAA is also active in educating the public and potential users about various forms of alternative dispute resolution, and conducts comprehensive training for arbitrators and mediators. The AAA has offices located throughout the United States and in Dublin, Ireland, Singapore, and Mexico City.

The AAA's preeminent position in administering arbitrations renders it uniquely qualified to provide a perspective it hopes will assist the Court in its consideration of the merits of this appeal. The AAA believes strongly in the continued development of arbitration as a prompt and cost–effective method of

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

resolving disputes. Through its extensive experience in administering arbitrations, the AAA can offer insight into the practical impact on the arbitration process of a decision permitting parties to contract for expanded standards of judicial review. Accordingly, the AAA respectfully files this brief as *amicus curiae* to urge this Court to affirm the decision of the Ninth Circuit Court of Appeals.

The AAA has previously filed *amicus curiae* briefs in many of the arbitration–related cases heard by the Court, including *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto–Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *UBC Southern Council of Indus. Workers, Local Union No. 2713 v. Bruce Hardwood Floors*, 522 U.S. 928 (1997); *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U. S. 79 (2000); and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal requires the Court to consider two valuable characteristics of arbitration, both of which the Court has supported in prior decisions: party autonomy, on the one hand, and economy and finality, on the other. *Amicus* strongly supports both principles and believes that this case does not require the Court to choose between them.

As reflected in the prior decisions of this Court and in the structure of the FAA, party autonomy extends to the full scope of the arbitration process, but does not expand into the judicial oversight of arbitration that has been carefully circumscribed by Congress. Therefore, in affirming the decision below, the Court can respect party autonomy in arbitration while strengthening the principle of finality in order to preserve the essential nature of arbitration as an expeditious, predictable, and private alternative to litigation.

Amicus firmly believes that the system of arbitration that has developed as a result of the FAA should be preserved. Permitting enhanced judicial review by contract would not only eviscerate the principle of finality in individual cases, but would likely transform arbitration into traditional litigation. If procedural efficiencies in arbitration were lost and if courts increasingly intervened in the

process, the value of arbitration would inevitably decline.

Indeed, one of the key principles driving passage of the FAA was that the finality of arbitration awards was essential to ensuring the effectiveness of this alternative form of private dispute resolution. For this reason, Congress expressly limited the role of courts in the arbitration process, including mandating that courts confirm arbitral awards except in very narrow instances. *Amicus* thus believes that to interpret the FAA in a manner that undermines the goals of finality and independence would contravene the rationale and plain terms of the FAA.

Permitting parties to dictate to courts which standard of review they should apply would also be a potentially unconstitutional delegation of Congress's authority to regulate the federal courts. Only Congress should be able to alter the standard of judicial review set forth in the FAA. Moreover, the ability of parties to contract for a second layer of arbitral review through the arbitration process should alleviate any concern about access to an appellate review mechanism.

Notably, international conventions and most other nations' statutes governing arbitration are in line with the FAA in strongly favoring a limited role of courts in arbitration. To the knowledge of *Amicus*, none permits parties to craft their own standards of judicial review of arbitral awards.

ARGUMENT

I. Enforcement of Agreements for Expanded Judicial Review of Arbitration Awards Would Erode the Benefits of the Arbitral Process, Frustrate Congress's Intent to Limit Judicial Intervention Into Arbitration Awards, and Violate the Plain Terms of the FAA.

This Court has recognized that Congress sought to protect the independence of the arbitral process by preserving the integrity of arbitral awards against judicial interference. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (referring to Congress's intent to establish a system of "final, binding arbitration"). The FAA thus confines courts' review of arbitration awards to carefully prescribed grounds; this structure leaves no uncertainty about Congress's intent to preserve the final and binding nature of arbitral awards.

Amicus believes that allowing parties to rewrite the FAA to permit enhanced and diverging standards of judicial review of arbitration awards would lead to the erosion of many of the benefits of the arbitral process as envisioned in the FAA. It would also contravene the rationale and plain terms of the FAA, which severely limits the grounds for such review.

This Court has also recognized that the FAA embodies a strong national policy favoring arbitration, which reflects Congress's intent that private arbitration agreements be enforced according

to their terms. *See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (observing that the FAA "requires courts to enforce privately negotiated agreements to arbitrate"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (holding that the ultimate purpose of the FAA is enforcement of the right to contract for arbitration).

Amicus fully supports the principle of party autonomy. However, as the *Volt* and *Byrd* cases demonstrate, this principle of autonomy applies to the arbitration process itself, and not beyond it to the scope of judicial scrutiny of awards. Nothing in the FAA or in this Court's prior decisions would suggest that party autonomy ought to extend to the role of the courts themselves.

A. Permitting Parties to Agree to Expanded Judicial Review Would Fundamentally Undermine the Arbitral Process.

One of the cornerstone principles of arbitration endorsed by Congress is that awards rendered by arbitrators are final and binding. If parties are allowed to contract for expanded judicial review of arbitration awards, arbitration will become a prelude to litigation, instead of a substitute for it. As discussed more fully below, in order to protect the independence of arbitration, the FAA sets forth a bright line that defines the respective roles of courts and arbitrators and ensures the finality of arbitral awards in all but the narrowest of circumstances.

Absent substantial respect for these defined roles, *Amicus* believes the unique characteristics of arbitration will be substantially undermined and replaced by proceedings similar to traditional litigation. As one court has observed, to compromise the finality of arbitral awards would be to "transform a binding process into a purely advisory one." *United States Postal Serv. v. American Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotations omitted); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (observing that "a restrictive standard of review is necessary to . . . prevent arbitration from becoming a preliminary step to judicial resolution") (internal quotations omitted).

Since passage of the FAA, the availability of arbitration has transformed the landscape of dispute resolution by providing parties with effective means of resolving disputes largely outside the judicial system. Some of the benefits of arbitration include elimination of burden on the courts, the ability to select a decision–maker with expertise in the subject matter at issue, cost reduction, efficiency and rapid resolution, and flexibility in crafting procedures by which the arbitration will be conducted. Last year alone, *Amicus* administered over 137,000 cases, the large majority of them arbitrations. But for the availability of the arbitral process made possible by the FAA, these disputes would have been litigated in the courts.

Some of the principal features of arbitration are flexible evidentiary standards and discovery requirements. *See, e.g.*, AAA Commercial Arbitration Rules, R–31(a) ("Conformity to legal rules of evidence shall not be necessary."); R–31(b) ("The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."). Furthermore, in typical commercial proceedings administered by *Amicus*, an arbitrator need not render a reasoned decision "unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." *Id.*, R–42. Arbitral decisions in proceedings administered by *Amicus* are to be rendered within thirty days from the close of proceedings, further reinforcing the expeditious nature of this form of alternative dispute resolution. *See id.*, R–41.

If contractual provisions for expanded judicial review are permitted by this Court, parties will be free to demand that courts engage in detailed review of the merits of the case. The layering of public and private dispute resolution would transform arbitral bodies into mini–district courts and federal district courts into quasi–appellate tribunals. Though this may be the arrangement to which some parties would agree, it plainly does not comport with Congress's denial of substantive review of arbitral awards, and it contravenes a fundamental principle of arbitration: to provide parties with a quick and

cost–effective method of resolving disputes. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (noting that enhanced review "threaten[s] to undermine the independence of the arbitration process and [to] dilute the finality of arbitration awards").

Amicus believes that, facing the prospect of enhanced judicial scrutiny, arbitrators will feel obliged to conduct the arbitration in a manner similar to traditional litigation. For instance, arbitrators are likely to demand more formalized evidentiary procedures and findings of fact, and feel compelled to create a record and a reasoned decision that will withstand court review. In turn, in the absence of a reasoned decision and complete and interpretable record, a district court tasked with applying a more searching legal or factual review of an arbitrator's award will likely demand more thorough briefing and submissions from the parties, which could effectively mean re–trying issues already decided by the arbitral tribunal.

Moreover, if Section 10 of the FAA is construed as optional, parties will be free to negotiate review standards of every stripe and color. The creation of a patchwork of standards for court review of arbitration awards under the FAA will in turn introduce confusion and uncertainty for individual arbitrators in the conduct of their proceedings. Arbitrators, as well as courts, will be required to interpret the varying applicable standards of review,

and consequently attempt to modify their conduct in light of those individual standards.

In turn, the meaning and scope of contractual provisions for judicial review would themselves become subject to judicial challenge, and would provide an invitation for additional litigation about procedural, not substantive, matters. District courts would be required to assess the standard of review in the parties' agreement using traditional methods of interpretation, including determining party intent where a contract is otherwise unclear. The interpretation and application of the standard of review would then be subject to challenge on appeal, resulting in further delay and expense for the parties and requiring more of the courts' limited time. Courts of appeals would have to invent standards for reviewing a district court's review of an arbitration award for errors of law, if a district judge were to be permitted to undertake such a review. Because the parties would be free to adopt a standard of review that contains language similar to Sections 10 or 11 of the FAA, a court's interpretation of such a standard may also lead to confusion about the meaning and scope of the statutory standards. Confusion would only increase as courts interpreted and applied additional privately negotiated standards of review. This multi–layered result would lie in direct opposition to the FAA's goal of cultivating efficient and less costly dispute resolution through finality and limited judicial involvement.

Preparing arbitrators for situations in which expanded judicial review is the norm would also create difficulties from an institutional perspective. The AAA requires mandatory training to ensure that its arbitrators possess the requisite case management ability, knowledge of the AAA's rules and standards, and legal competence. It will become more difficult to ensure that arbitrators are properly trained if their training must also encompass constantly shifting standards of judicial review.

The proceedings below between the parties, Hall Street and Mattel, illustrate the negative impact of enhanced judicial review on the arbitral process. In exercising *de novo* legal review of the arbitrator's decision, as provided for in the parties' agreement, the district court interpreted the disputed contractual provision differently than did the arbitrator. The court then remanded to the arbitrator for further consideration. After the arbitrator rendered a revised decision, the parties once again sought judicial review of that decision before the district court, launching a series of appeals and remands that lasted another three years.

Enhanced review thus threatens to transform district courts from a safeguard against procedural irregularities into an appellate court sitting in judgment on the merits. The results will be burden on the courts, prolonged and costly arbitrations, and, ultimately, erosion of the effectiveness of arbitration as an independent and efficient alternative dispute

resolution mechanism. Such a result would be directly contrary to Congress's intent to facilitate an effective arbitration process. *See Volt*, 489 U.S. at 478 (citing Congressional awareness "that the Act would encourage the expeditious resolution of disputes"); *Byrd*, 470 U.S. at 219 (recognizing "the Act's goal of speedy and efficient decision-making").

B. As Congress Recognized in Enacting the FAA, the Effectiveness of the Arbitration Process Depends Upon the Clear Separation of the Arbitration and Judicial Processes.

The FAA was passed in 1925 to ensure judicial support for arbitration by rendering contractual arbitration agreements enforceable in U.S. courts. H.R. REP. NO. 68-96, at 1 (1924). Congressional supporters of the FAA consistently cited the finality of awards and the resulting reduction in delay and expense as among the primary benefits of arbitration. *Id.* at 2. (arguing that "interference by the court" will be lessened by requiring enforcement of arbitration agreements and limiting the grounds for attack); S. REP. NO. 68-536, at 3 (1924) (justifying arbitration as a method "to avoid the delay and expense of litigation").

These considerations helped ensure the widespread support of the FAA at its passage. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270-71 (1925) (noting that challenges to arbitration awards

meant that "the delay in finally recovering judgment was substantially as great as through action had been brought upon the original dispute") [hereinafter Cohen & Dayton]; Justice Charles L. Guy, Speech Before the League of Women Voters (March 2, 1925), *quoted in The Arbitration Movement*, 5 BUS. L.J. 257, 260 (1925) (asserting that one of the central benefits of arbitration is the finality of the award except in cases of "fraud or gross misconduct").

Congress's desire to make effective a system of independent and expeditious dispute resolution was reflected in the terms of the FAA itself, which were crafted so as to preserve the independence of arbitration from judicial interference. Cohen & Dayton, *supra*, at 273 (observing that the Act is framed so that "[t]here is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been"). Absent such finality, the benefit of the arbitrator's specialized expertise would be lost. *See* Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 AM. BAR ASSOC. J. 153, 155 (1925) (explaining that often "the judge or the jury is not and cannot be made familiar with the peculiarities of the given controversy").

In order to achieve these goals, Congress created a partnership between courts and arbitration, pursuant to which arbitrators decide how an arbitration shall be conducted, as well as the merits of a controversy, and courts provide oversight for

certain enumerated issues that may arise in the course of an arbitration. Notably, the role of courts in the conduct of an arbitration is confined to ensuring enforcement of the parties' agreement to arbitrate.[2] *See* H.R. REP NO. 68-96, at 2 (1924) ("Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court.").

The provisions that become effective once the arbitration award is rendered also carefully circumscribe the court's role. Section 9 of the FAA governs a court's treatment of arbitral awards once rendered. It requires that a court "must" grant an order confirming the award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9 (2000). This language is clear and unequivocal: when the FAA applies, courts must enforce arbitral decisions so long as those awards do not qualify for vacatur or modification as defined by the Act. Sections 9, 10 and 11 contain no language directing district courts to follow the terms of the parties' agreement when confirming, vacating, or modifying an award. *Cf. id.*

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[2] For example, the FAA authorizes courts to issue a stay of litigation pending an arbitral decision (9 U.S.C. § 3), to compel arbitration if provided for in a written agreement (*id.* § 4), to appoint arbitrators if not otherwise specified (*id.* § 5), and to compel attendance of witnesses at arbitral hearings (*id.* § 7).

§ 4 (permitting a motion to compel arbitration "in the manner provided for in [an] agreement").

Section 10 of the FAA in turn sets forth the four grounds by which courts "may" vacate an arbitral award. *Id.* § 10.[3] The enumeration of four specific grounds for vacatur strongly implies that the potential grounds for vacatur are limited. This is particularly true in light of Section 9's command that courts confirm arbitral awards *except as* provided for in Sections 10 and 11.[4] Each of the grounds for

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[3] *See* 9 U.S.C. § 10(a)(1) ("where the award was procured by corruption, fraud, or undue means"); *id.* § 10(a)(2) ("where there was evident partiality or corruption in the arbitrators"); *id.* § 10(a)(3) ("where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy . . . [or] any other misbehavior by which the rights of any party have been prejudiced"); *id.* § 10(a)(4) ("where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made").

[4] The use of the word "may" in Section 10 demonstrates that a court need not vacate an arbitral award even if one of the four specified grounds exists. *Cf. In re Chromalloy Aeroservices*, 939 F. Supp. 907, 909 (D.D.C. 1996) (noting that, in the similar statutory context of the provisions enacting the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 9 U.S.C. §§ 201–08, a court retains discretion not to vacate an award even when a statutory ground for vacatur exists).

vacatur of arbitration awards set forth in Section 10(a) protects the integrity of the arbitration process; none permits review of the substance of an arbitrator's decision. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990) (observing that the FAA "carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways . . . [and] contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal [errors]").

Despite attempts by some parties to contravene the plain terms of the FAA by seeking substantive judicial review following an adverse arbitral ruling, this Court has authorized lower courts to set aside arbitral awards "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). The lower courts have accordingly resisted any temptation to interpret Section 10(a) broadly. *See, e.g., Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991) (noting that courts have "consistently accorded the narrowest reading" to section 10(a)(4)).

Some lower courts, based on this Court's dictum in *Wilko v. Swan*, 346 U.S. 427 (1953), have permitted vacatur where an arbitrator has demonstrated "manifest disregard" of the law. *Id.* at 436. This Court has never explicitly endorsed this

judicially created ground for vacatur, and in fact has observed that a common–law exception to Section 10(a) would be "difficult to reconcile . . . with this Court's subsequent decisions involving the Arbitration Act." *Shearson/American Express, Inc.*, 482 U.S. at 231–32. However, even if this Court were to endorse certain judicially created doctrines, they would still remain qualitatively different from party–created standards of review, which would be infinite, inconsistent, and more difficult to apply. *See* Sec. A, *supra*.

Moreover, in contrast to other statutes, Congress has not equipped courts to "provide the same judicial review [to arbitration decisions as that] given to structured judgments defined by procedural rules and legal principles." *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (internal quotations omitted).[5] The FAA's procedural directives do not contemplate a system of quasi–appellate review of arbitral decisions by district courts outside the narrow review provided for in Sections 9, 10, and 11. This lack of procedural guidance would prove particularly onerous in the

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[5] Compare the Social Security Act, for example, in which Congress has provided detailed procedural guidelines to govern substantive judicial review of the decisions of Administrative Law Judges, including the requirement of a written record. *See* 42 U.S.C. § 405(g). Similarly, the Administrative Procedure Act sets forth specific procedures governing a district court's review of an agency's action. *See, e.g.*, 5 U.S.C. § 611.

case of arbitral awards, which are generally not required to be set forth in a reasoned opinion.

C. The FAA's Respect for Party Autonomy Does Not Create a Right to Contract for an Alternative Judicial Standard of Review.

Amicus believes that the principle of party autonomy is important to the effective functioning of arbitration. Yet, this principle must be understood in light of the separation, described above, between the arbitration process and the FAA's carefully defined judicial procedures.

The ability of parties to use the flexibility of the arbitration process to tailor procedures to each case is one of the advantages of arbitration. The FAA embodies this principle, as it sets out very few mandatory procedures in the arbitration process. *Cf. Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983) (noting "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). This Court has recognized the importance of party autonomy, as it has held that arbitral provisions will be enforced according to their terms even when they lead to less efficient dispute resolution. *See, e.g., id.* at 20 (observing that FAA may require two claims arising out of the same facts to be heard in different fora); *Byrd*, 470 U.S. at 217 (holding that FAA requires courts to "compel

arbitration . . . even where the result would be . . . possibly inefficient").

This Court's prior holdings endorsing parties' freedom to determine procedures have concerned the arbitration process itself, however, not the scope of a court's review of the substance of an arbitral award. The agreements in those cases did not conflict with any clear and unequivocal provision of the FAA, and they did not require this Court to determine whether the parties' agreements were consistent with the FAA's policy of ensuring the finality of arbitration awards.

In *Volt*, for instance, the question was whether a state procedural rule, to which the parties had agreed by contract, conflicted with the policies and objectives of the FAA. *Volt*, 489 U.S. at 475–76. Because the contracted–for rule did not "[do] violence to the policies behind" the FAA, this Court held that the state procedural rule for which the parties had contracted should be enforced. *Id.* at 479; *see also Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (parties may decide which issues shall be subject to arbitration); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 87 (2002) (Thomas, J., concurring) (parties may decide the procedural rules applicable to the arbitration proceeding).

The FAA's endorsement of party autonomy and flexibility to decide the scope and procedure of the arbitration process is appropriate. However, as

shown in Section I.B above, the FAA does not grant parties the power to determine the rules applicable to the judicial review of the arbitral award, and none of this Court's prior decisions have held otherwise. Adhering to this distinction is important because permitting private parties to determine the scope of a court's legal and factual review of an arbitral decision would not only undermine the goals of the FAA and the effective functioning of the arbitration process, as shown in Section I.A. above, but would also raise serious questions of an unconstitutional delegation to private parties of Congress's power to regulate the practice and procedure of the courts.

As an exercise of its power, Congress may prescribe "how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate"; the procedural rules of the FAA are a proper exercise of this power. *Prima Paint Corp.*, 388 U.S. at 405; Federal Rule of Civil Procedure 81(a)(3). Congress may not, however, delegate its power to make law to private parties. *See Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."). Accordingly, this Court should apply the canon of constitutional avoidance and reject an interpretation that would raise such constitutional problems. *See DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here . . . construction of a statute would raise serious constitutional

problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.").

For these reasons, this Court can continue to respect and to encourage the principle of party autonomy while rejecting the idea that parties can agree to set judicial standards of review of arbitration awards. In so doing, the Court would also preserve the separateness and efficiency of the arbitration process.

D. Parties Seeking a Second Layer of Review of Arbitration Awards Are Free to Contract for an Arbitral Appellate Review Process.

If Congress wishes to afford parties a level of judicial review that differs from that mandated by the FAA, it is free to do so. Absent such action, parties desiring substantive appellate review of their arbitral award are free to contract for such review by an arbitral panel in the same manner that they contract for the arbitration itself. The FAA does not deny this right. *See, e.g., Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award."); Wharton Poor, Arbitration *Under the Federal Statute*, 36 Yale L. J. 667, 674–76 (1926–27) (observing that if parties desire expanded review, "the arbitration agreement could well be drawn to provide for a review by a board of appeal"). In addition, of course, if parties wish to have

procedural or substantive protection that they feel only a judge can provide, then they are free to appoint one or more judges as their arbitrator, and to so agree in their contract.

Amicus, for instance, offers a draft clause to parties who wish to contract for appeal to a second panel of arbitrators. Such parties have the freedom to establish the standard of review that will be applied by the appellate arbitration panel, including review for errors of law. *See* AAA Drafting Dispute Resolution Clause 27; *see also* United Nations Commission on International Trade Law ("UNCITRAL") Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary–General, Art. 34(1) cmt. 2. UN Doc A/CN.0/264 (noting that the UNCITRAL Model Law on International Commercial Arbitration does not limit parties' ability to contract for appeal to an arbitral tribunal, nor does it circumscribe the grounds upon which an award may be contested in such an appeal).[6]

The availability of arbitral appeal mechanisms should resolve any concerns the Court may have about parties' ability to seek redress for an arbitral

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[6] New York State also provides for arbitral appeal of awards rendered pursuant to its No-Fault Automobile Insurance Law. The sole recourse for modification or vacatur of an award is appeal to a master arbitrator, who may review the award on specified grounds, including for errors of law. *See* 11 N.Y.C.R.R. § 65–4.10.

ruling, should they desire to contract for such review. Notably, in the experience of *Amicus*, relatively few parties take advantage of the availability of appellate arbitral review. *Amicus* estimates that less than one percent of arbitration agreements submitted to it for administration contain provisions for appellate review. This reticence is likely due in part to the fact that such review directly undermines the primary considerations that drive parties to choose arbitration as a dispute resolution mechanism: expediency, finality, and cost-effectiveness.

II. Permitting Expanded Judicial Review of Arbitral Awards Would Put the United States At Odds with the International Arbitration Community.

As far as *Amicus* is aware, no country permits parties to create their own standards of judicial review of arbitration awards. To the contrary, international instruments such as the New York Convention explicitly discourage the involvement of courts by emphasizing the final and binding nature of arbitral awards and by limiting grounds for judicial review to serious procedural deficiencies.

Similar to the FAA, arbitration statutes of most countries, many of which track the UNCITRAL model law, provide for judicial review on strictly limited grounds.[7] Some countries even encourage parties to waive statutory provisions permitting limited judicial review or arbitral appeal by agreement, thus taking a step further toward ensuring the absolute finality of arbitral awards. *See, e.g.*, Hong Kong Arbitration Ordinance, Chapter 341, art. 23B(1) (1997); Peru, General Arbitration Law No. 26572, art. 60 (1996); Algerian Code of Civil Procedure, art. 446 (as amended by Legislative Decree No. 93-09 of 1993); Swiss Private International Law Act, art. 192 (1987); Argentine

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[7] Over 50 countries have adopted the UNCITRAL Model Law on International Commercial Arbitration, which provides in Article 34 that an arbitral award may only be set aside on certain exclusive and limited grounds.

National Code of Civil and Commercial Procedure, Law No. 17.454, Book 6, Title I, art. 741 (as consolidated by Decree 1.042 of 1981); Chile, Organic Law of the Judiciary, Law 7421, Title IX, art. 239 (1943). Even the few countries that contemplate the possibility of substantive appeal of an arbitration award in court by party agreement do not permit the parties to determine contractually the applicable standard of review. *See, e.g.*, English Arbitration Act, §69 (1996); Singapore Arbitration Act, art. 49 (2002); Belgian Judicial Code, Part Six, art. 1703(2) (1972).

The clear trend in the international arbitration community is toward less judicial interference with arbitral awards, not more. For example, the 1996 English Arbitration Act took steps to actively confine the scope of judicial review of arbitral awards that was previously available to narrowly defined and exhaustive grounds. *See* English Arbitration Act, §§ 67–69 (1996); *see also* Sir Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration: 2001 Companion Volume 51* (2d ed. 2001) (observing that the English Act greatly restricted recourse to courts because "a right to appeal is inimical to the philosophy of finality and despatch which imbues the 1996 Act").

In France, moreover, another of the world's leading arbitral jurisdictions, a contractual clause providing for judicial appellate review of an arbitral award in an international arbitration is considered void. *See* Emmanuel Gaillard & John Savage,

Fouchard Gaillard Goldman on International Commercial Arbitration, § 484 (1999) ("Another example [of a pathological clause] is an agreement that permits an appeal from the award before national courts in cases where the subject–matter is international."); Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 Am. Rev. Int'l Arb. 215, 218 (1999), *citing* Paris Court of Appeal, Dec. 12, 1989, *Societe Binate Maghreb v. Soc Screg Routes*, 1990 REV. ARB. 863.

International arbitration mechanisms reflect a strong belief in the finality of arbitral awards as a key component to the success of the arbitral system. A ruling by this Court in favor of permitting private parties to contract for expanded standards of judicial review would thus stand in contrast to established international standards and practice.

CONCLUSION

WHEREFORE, *Amicus* AAA respectfully urges the Court to affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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No. 06-989

In the Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CTIA—The Wireless Association® submits this brief as amicus curiae in support of petitioner Hall Street Associates, L.L.C.[1]

INTEREST OF THE *AMICUS CURIAE*

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association ("CTIA") represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and internet companies, as well as other contributors to the wireless universe. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless issues.

Many of CTIA's members have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes. CTIA sponsored the Wireless Industry Arbitration Rules (see http://www.adr.org/sp.asp?id=22214), which are administered by the American Arbitration Association and which have been incorporated in the arbitration agreements of many members of the industry.

CTIA's members currently use or are considering using arbitration provisions that reject the default rules governing judicial review of arbitration awards and instead provide that

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

judges may vacate or modify an arbitration award on the ground that it is based on an error of law or is unsupported by the evidence. In instances when the parties to an arbitration agreement contract around the default judicial-review rules, they have made a calculated decision that the risks of an erroneous arbitration award outweigh the slightly increased procedural costs involved in authorizing expanded judicial review.

By refusing to enforce such a provision in this case, the Ninth Circuit ignored not only the parties' desires but also Congress's intent in enacting the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. Were the lower court's decision to stand, it could easily prove to be a poison pill that causes CTIA's members to give up on arbitration in a wide variety of circumstances. Because such an outcome is in no one's interest and flies directly in the face of the policies animating the FAA, CTIA has a strong interest in this Court reversing the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

As Judge Kozinski has noted, the legal question presented in this case—whether the parties to an arbitration agreement may contractually provide for judicial review of an arbitral award on grounds broader than those specified in Sections 10 and 11 of the FAA—is "closer than most." *La-Pine Tech. Corp.* v. *Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by Kyocera Corp.* v. *Prudential-Bache Trade Svcs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *cert. dismissed*, 540 U.S. 1018 (2004). We submit that there is enough play in the joints of the FAA to allow the parties to contractually expand the grounds for vacating or modifying an award. Because we expect petitioner to address the statutory argument in detail, however, we focus here on demonstrating that there are no valid *policy* justifications for affirming the Ninth Circuit's decision. Federal arbitration law is animated by two overarching principles: that contractual arbitration agreements

should be enforced as written and that private parties should be encouraged to arbitrate their disputes. A ruling for respondent would undermine each of these policies.

A. It is well established that arbitration is a creature of contract and that one of the fundamental animating principles of the FAA is to enforce contractual arbitration agreements as drafted. See, *e.g.*, *Volt Info. Scis.* v. *Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478–479 (1989). Here, the parties agreed to arbitrate this dispute, and one aspect of that contractual agreement was the condition that any eventual arbitral award could be reviewed in court for legal error. Under the FAA, the parties' arbitration agreement should be enforced according to its terms—and it is at best unseemly for respondent, having contractually agreed to an arbitration clause providing for judicial review of legal errors, now to argue that the district court lacked the power to engage in such review.

B. As this Court has repeatedly noted, in enacting the FAA Congress also specifically intended to encourage parties to agree to arbitrate their disputes. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 23–24 (1982). But as this and other cases demonstrate, there are a variety of situations in which parties may be unwilling to agree to arbitrate a dispute without providing for expanded judicial review of the arbitrator's decision. Thus, a ruling for respondent in this case would decrease the number of disputes sent to arbitration—a result completely antithetical to this animating principle of the FAA.

Accordingly, and because nothing in the statutory text of the FAA mandates a contrary result, this Court should reverse the decision below and reaffirm that parties may structure their arbitration clauses as they see fit.

ARGUMENT

A. The Federal Arbitration Act mandates that the terms of contractual arbitration agreements—including provisions altering the default rules for judicial review—be enforced as drafted.

1. Section 2 of the FAA mandates that a "written provision * * * to settle [a controversy] by arbitration * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. As this Court explained in *Volt*, "Congress' principal purpose" in enacting the FAA was to "ensur[e] that private arbitration agreements are enforced according to their terms." 489 U.S. at 478. In other words, under the FAA "arbitration is simply a matter of contract between the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995).

It therefore follows necessarily that "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. The FAA does not require that arbitration be conducted "under a certain set of procedural rules." *Id.* at 476. And in particular, it does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479.

Judge Posner has famously made the same point in somewhat more colorful terms: "[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.).

Thus, just as parties must be free to choose the number of arbitrators, the discovery rules governing the arbitration, and whether arbitration will be stayed pending related litigation or vice versa, so too must the parties be free to choose the rules governing the standards for judicial confirmation of an arbitral award. Cf. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 67 (1995) ("'Just as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.'") (quoting *Volt*, 489 U.S. at 479). Any other result would violate the foundational principle that parties are free to structure their arbitrations as they see fit.

2. The Ninth and Tenth Circuits—the only two federal courts of appeals to hold that parties may not contractually expand the grounds for vacating or modifying an arbitral award—rested their rulings on a fundamentally different and incomplete understanding of the policies underlying the FAA.. According to the Ninth Circuit, Congress did not want to "permit unnecessary public intrusion into private arbitration procedures." *Kyocera Corp.*, 341 F.3d at 998. It reasoned that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.* As the Ninth and Tenth Circuits see it, Congress intended to permit parties "to trade the greater certainty of correct legal decisions by federal courts for the speed and flexibility of arbitration determinations" (*ibid.*), and "limited review ensures judicial respect for the arbitration process" (*Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001)). Conversely, "[c]ontractually expanded standards * * * threaten to undermine the independence of the arbitration process." *Id.* at 935. "Expanded judicial review * * * reduces arbitrators' willingness to create particularized solutions" and "would require arbitrators to issue written opinions with conclusions of law and findings of fact, further sacrificing the simplicity,

expediency, and cost-effectiveness of arbitration." *Id.* at 936 & n.7.

This analysis fails to credit the diversity of forms that privately negotiated arbitration agreements may take, and, in so doing, pays no heed to Congress's intent in passing the FAA. Although limited judicial review is a convenient *default*, parties may contract around it without doing violence to the policies served by the Act. "While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" *Volt*, 489 U.S. at 478 (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 220 (1985)); see also *Byrd*, 470 U.S. at 219 ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."). "The basic objective" of the FAA "is not to resolve disputes in the quickest manner possible," but rather to implement the parties' wishes. *First Options*, 514 U.S. at 947.

3. It is also not a valid rejoinder to claim that provisions authorizing expanded judicial review will increase the workload of courts. Cf. Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 149 (1997). Although it is admittedly an empirical question on which we know of no data, there is good reason to believe that, if anything, the reverse is likely to prove true: Were this Court to hold that parties could not contract for expanded judicial review of arbitration decisions, it seems quite likely that some number of disputes that otherwise might have proceeded to arbitration will instead by litigated *ab initio*—and there can be no serious question that presiding over the whole host of pretrial and trial proceedings inherent in federal litigation would prove more burdensome to a federal district court than engaging in slightly-more-

extensive review of an arbitral award.[2] See *LaPine*, 130 F.3d at 891 (Kozinski, J., concurring) ("enforcing [an] arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication").

To be sure, as Judge Kozinski noted in *LaPine*, one can imagine specific judicial-review provisions that might be unenforceable; for example, Judge Kozinski would not enforce an arbitration agreement that specified that "the district judge would review the award by flipping a coin or studying the entrails of a dead fowl." *Ibid.* But that limitation goes to judicial competence, not judicial authority under the FAA. There is no policy reason why a district court judge should not be allowed to determine whether an arbitrator misinterpreted the law, if the parties have specified by contract that the court should have that authority.

B. Refusing to enforce contractual agreements to expand the grounds for vacating or modifying an arbitral award would undermine Congress's goal of encouraging parties to arbitrate their disputes.

As this Court recently reiterated, Section 2 of the FAA "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 126 S. Ct. 1204, 1207 (2006). The statute "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24; see also, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1987) (expressing the Court's "strong endorsement

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[2] Because the FAA does not create federal subject-matter jurisdiction (see *Moses H. Cone*, 460 U.S. at 25 n.32), any dispute in which a federal court would have jurisdiction to confirm an arbitral award under the FAA would also be a dispute over which the federal court would have subject matter jurisdiction to preside over full-blown litigation.

of the federal statutes favoring this method of resolving disputes"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting the "emphatic federal policy in favor of arbitral dispute resolution"); *Southland Corp.*, 465 U.S. at 10 ("[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration"); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements'") (quoting *Moses H. Cone*, 460 U.S. at 24).

But it is clear that some parties will be unwilling to agree to arbitrate their disputes, or at least certain types of disputes, if they cannot contractually expand the bases for vacating or modifying the arbitrator's decision. Among other things, parties may decide that they are unwilling to "bet the company" on arbitration, where there is some risk of a rogue arbitrator issuing an unsupportable decision.[3]

In fact, Justice Souter noted this concern during the oral argument in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003)—there, over the effect of a more-or-less unreviewable decision by an arbitrator to certify a class in an ar-

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[3] Several courts have refused to review large, disproportionate punitive damages awards imposed by arbitrators even though those awards almost surely would have been reduced dramatically had they been imposed by a jury. Compare, *e.g.*, *Stark* v. *Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 802–803 (8th Cir. 2004) (reversing district court's vacatur of $6 million arbitrator-imposed punitive award that was 3,000 times the compensatory damages and explaining that by "removing the matter to arbitration," the defendant "got exactly what it bargained for") (internal quotation marks omitted) with *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797–799 (8th Cir. 2004) (reducing $6 million jury-imposed punitive award to $600,000 where compensatory damages were $600,000). Without the ability to contractually provide for review for legal excessiveness, businesses will be understandably reluctant to venture into the arbitral forum.

bitration—by questioning whether, "[w]ithout judicial review, [a party to an arbitration agreement] would * * * have rolled the dice for $27 million on one arbitrator." See Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634), 2003 WL 1989562, at 47 (Apr. 22, 2003); see also *id.* at 29 (observation of one Justice that "[y]ou might not want to put your company's entire future in the hands of one arbitrator").

Commentators also have recognized this concern. As one has explained, "[i]n recent years there has been a growing concern over the "Russian Roulette" nature of arbitration. In several conspicuous, high stakes disputes * * * arbitrators have rendered decisions that have fallen well outside the reasonable expectations of the parties." Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999); see also, *e.g.*, Alan Scott Rau, *Contracting out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 259 (1997). Expanded judicial-review provisions address this concern, and allow parties to arbitrate disputes that they otherwise might be unwilling to arbitrate.

Of course, this is not to say that expanded judicial review should be *mandated*. We presume that in the vast majority of arbitration agreements the parties will continue to choose savings in procedural cost over the protection afforded by expanded judicial review appeals. But what policy does it serve to deny expanded judicial review to those who want it? If this Court holds that the FAA precludes contracting for broader review, more and more parties will eschew arbitration, which will undermine Congress's goal of encouraging arbitration.

Thus, a ruling for respondent in this case would decrease the number of disputes sent to arbitration—and will add to the workload of our already-overburdened courts—an outcome that is completely antithetical to the national policy favoring the arbitration of disputes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the
Supreme Court of the United States
October Term, 2006

HALL STREET ASSOCIATES, L.L.C.,
Petitioner,
v.
MATTEL, INC.,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

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QUESTION PRESENTED

1. Does the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, allow parties in their arbitration agreements to expand the FAA's narrow standard of judicial review for vacating an arbitration award?

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No. 06 - 989

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BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and National Federation of Independent Business Legal Foundation ("NFIBLF") seek to bring to the Court's attention their views, and the views of their supporters, concerning the right of parties to an arbitration agreement to supplement the narrow statutory bases for judicial review under the Federal Arbitration

Act ("FAA"), 9 U.S.C. §§ 1-16.[1]

Amicus curiae NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses, law firms and other organizations from New England and elsewhere throughout the United States.

Amicus curiae NFIBLF is a nonprofit, public interest law firm established to be the national voice and a legal resource for small business. NFIBLF is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB has as its mission to promote and protect the right of its members to own, operate and grow their businesses.

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1 Pursuant to Supreme Court Rule 37.6, counsel for amici state that neither counsel for Petitioner nor counsel for Respondent authored this Brief in whole or in part and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3 (a), amici have filed herewith written consent for the filing of this brief from counsel for each party.

NELF, NFIBLF, and their respective members are committed to ensuring a reasonable interpretation of statutes, such as the FAA, that influence the business community and to upholding parties' freedom of contract. Amici are concerned in this case with securing a ruling that the FAA's narrow standard of judicial review is a default standard that allows parties to agree to more expansive judicial review. The FAA's limited standard of review exposes NELF and NFIBLF's member businesses, and businesses generally, to the risk of legally erroneous arbitral decisions that are unreviewable on the merits. Since business disputes frequently involve high financial stakes, a decision confirming parties' freedom to contract for more heightened judicial review may well be a prerequisite to businesses' willingness to arbitrate their disputes. By contrast, affirmance of the Ninth Circuit's decision may deter the business community from choosing to arbitrate, thereby increasing the judiciary's caseload.

NELF and NFIBLF have each appeared regularly before this Court in cases raising issues of general significance to the New England and national business communities. *See, e.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544

U.S. 280 (2005); *Ballard v. Comm'r*, 544 U.S. 40 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). As they did in these prior cases, amici seek to provide an additional perspective which could aid the Court in deciding the issue presented in this case.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner.

SUMMARY OF ARGUMENT

The FAA's narrow standard of judicial review is not exclusive but is instead a default standard that parties may supplement in their arbitration agreements. While the language of the FAA is silent on the issue, both the legislative history and decisions of this Court interpreting the FAA establish that the FAA was intended primarily to enforce the terms of parties' arbitration agreements, even when those terms depart from the FAA's provisions or affect the simplicity or finality of the arbitral process. There are also compelling policy reasons for permitting parties to contract for expanded judicial review, most notably the importance to many businesses considering arbitration of securing expanded judicial review of

potentially large arbitral awards. The FAA's limited standard of judicial review exposes businesses to the risk of irrational or excessive arbitral awards that are unreviewable on the merits. The ability to contract for expanded review may therefore be the *sine qua non* for many businesses considering arbitration. Recent studies indicate that businesses are indeed avoiding arbitration and that the absence of judicial review on the merits is a strong motivating factor. A decision confirming the right of parties to contract for expanded judicial review can be expected to draw businesses back to arbitration as a viable alternative to litigation, thereby serving the interests of judicial economy.

ARGUMENT

I. The FAA's narrow standard of judicial review is a default standard that parties may expand by agreement.

This case involves the interpretation of § 10(a) of the FAA, which provides narrow bases on which a federal court may vacate an arbitration award.[2] Section

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2 9 U.S.C. § 10(a) provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

10(a) addresses flaws in the arbitral process but does not allow courts to review the merits of the arbitral award. At issue is whether § 10(a) establishes the exclusive standard of judicial review or is merely a minimum default standard that parties are free to supplement in their arbitration agreements. The FAA is silent on this issue.

The parties in this case executed an arbitration agreement while litigation was pending that required the arbitrator "to decide the matters submitted based upon the evidence presented and the applicable law," and to issue a written decision with findings of fact and conclusions of law. (Petitioner's Appendix ("App.") 16a, ¶ 27). The agreement required the reviewing court, in turn, to vacate, modify, or correct the decision if the

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> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

arbitrator's findings of fact were not supported by substantial evidence or if the arbitrator's legal conclusions were erroneous. *Id.* This provision for expanded judicial review was central to the parties' agreement to arbitrate their dispute. (2003 SER 153). The parties proceeded to arbitration, and the federal District Court for the District of Oregon subsequently vacated the arbitrator's decision due to errors of law. The Ninth Circuit reversed the District Court and invalidated the contractual term expanding judicial review because the Ninth Circuit concluded that § 10(a) provides the exclusive grounds for vacating an arbitral award. (App. 115A).

The Ninth Circuit has erred because its decision contradicts this Court's precedents interpreting the FAA. Since the FAA is silent on whether § 10(a) is an exclusive or default standard of review, this issue should be resolved in light of the statute's primary purpose. *See Robinson v. Shell Oil Co.,* 519 U.S. 337, 346 (1997). This Court has held that the FAA's primary purpose is to enforce the terms of the parties' arbitration agreement, and that the FAA allows parties to fashion their own rules of arbitration that may differ from the FAA's provisions:

> The FAA [does not prevent] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced

according to their terms.

Volt Info. Serv., Inc. v. Bd. of Trustees, 489 U.S. 468, 478-479 (1989) (enforcing arbitration agreement permitting stay of arbitration pending litigation between one party to arbitration and third party, where FAA requires stay of litigation between parties to arbitration agreement but does not address third-party litigation).

The Court recognized in *Volt* that the parties' freedom of contract is of paramount concern under the FAA, even when the exercise of that freedom may generate contract terms that depart from the FAA's provisions. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences*, 489 U.S. at 469. Applying this principle from *Volt* to § 10(a) establishes that it is not a mandatory and exclusive standard of review restricting parties' ability to bargain for the scope of judicial review appropriate to their circumstances. Instead, § 10(a) is a threshold standard ensuring basic procedural fairness in the arbitral process but allowing parties to supplement the statutory bases for judicial review if they so choose. Interpreting §10(a) as a default standard "preserve[s] the concept of freedom of contract by allowing parties to opt out of [it] in favor of a regime they prefer." Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 Hastings L.J. 1199, 1251 (2000).

The FAA's legislative history confirms this interpretation of § 10(a) because it shows that the intent of Congress was not to limit the scope of parties' arbitration agreements but rather to overcome widespread judicial hostility toward these agreements. "To overcome judicial resistance to arbitration, Congress enacted the [FAA] . . . ." *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204, 1207 (2006).[3] In light of this historic judicial hostility, Congress most likely assumed that parties to arbitration agreements would not want courts to interfere with arbitrators' awards by reviewing their merits. "It is quite probable that the drafters [of the FAA] simply did not contemplate that parties would ever be interested in

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3 As the Court has explained in greater detail,

> The House Report accompanying the [FAA] makes clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' . . . and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate."

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924)). *Accord E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[the FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts'") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

expanding judicial review of arbitration awards." Cole, *Managerial Litigants?*, 51 Hastings L.J. at 1255 (discussing FAA's legislative history).

This conclusion finds support in the historical origins of commercial arbitration in this country. At that time, commercial arbitration generally involved the resolution of disputes by business people well-versed in trade practices and customs, rather than by lawyers applying legal principles:

> Prior to the passage of the FAA, commercial arbitration was considered an appealing alternative to litigation in which parties could decide disputes informally, through self-governance and reference to industry norms, rather than through formal, lengthy, and costly litigation. . . . Arbitrators were chosen according to the expertise within their industry, and were thus perhaps more apt [than lawyers or courts] at determining how such disputes should be decided . . . . There was generally no expectation that arbitrators would apply legal principles, but rather . . . that arbitrators would [rely upon] their experience in particular areas of business industries.

Caroline Kornelis, *Closing the Door, but Opening a Window: The Supreme Court's Reaffirmation of Applying the Federal*

Arbitration Act to the States, 2006 J. Disp. Resol. 657, 659 (2006). *Accord* Stephen A. Hochman, *Judicial Review to Correct Arbitral Error--An Option to Consider*, 13 Ohio St. J. on Disp. Resol. 103, 103 (1997) ("[c]ommercial arbitration in the United States had its inception in certain industries . . . where the parties wanted industry people rather than lawyers to decide their disputes, primarily on the basis of customary practices in their industry rather than legal principles").

Given this historical background of dispute resolution based on industry practice and judicial hostility toward arbitration, § 10(a) is properly understood as limiting the courts' traditional reviewing powers but not limiting the parties' contractual powers. "Congress presumed parties wanted the speed and simplicity of arbitration" rather than traditional appellate review. Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 184 (2003). However, the overarching purpose of the FAA is to enforce parties' arbitration agreements and to grant them the autonomy to define their own arbitral rules. *See Volt*, 489 U.S. at 469. Therefore, when the express terms of an agreement seek to expand judicial review, these terms should trump historic assumptions about parties' preference for minimal judicial involvement in the arbitral process. After all, "[a]rbitration under the Act is a matter of *consent, not coercion*, and parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S.

52, 57 (1995) (quoting *Volt*, 489 U.S. at 479) (emphasis added). Simply put, the arbitral process under the FAA is a creature of contract, from the initiation of a claim through judicial review.

While expanded judicial review might lengthen the dispute resolution process, and while the FAA does embody a policy that arbitration should be speedy and efficient,[4] this Court has held that any conflict between expediency and the parties' intent "must be resolved in favor of the latter in order to realize the intent of the drafters." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (enforcing agreement to arbitrate state securities law claims even though result was inefficient bifurcation, in separate arbitral and judicial fora, of state and federal securities laws claims). Therefore, the primacy of the parties' intent defeats any objection to expanded judicial review on the basis that it complicates or prolongs the arbitral process:

> We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims . . . . [P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not . . . allow the fortuitous impact of

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4 *See Dean Witter Reynolds v. Byrd*, 470 U.S. at 220.

> the Act on efficient dispute resolution to overshadow the underlying motivation.

Dean Witter Reynolds, 470 U.S. at 219, 220. *Accord First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) ("the basic objective [under the FAA] is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms . . . .'") (citations omitted). The FAA codifies a national mandate of party autonomy in the arbitral process, and any competing concerns that inhere in the FAA must yield to this overriding goal.

II. Confirming parties' freedom to contract for expanded judicial review would foster reliance on arbitration and reduce the judiciary's caseload.

In addition to the support derived from the FAA's legislative history and purpose, there are compelling policy reasons to recognize parties' right to supplement the statutory bases for judicial review of arbitral decisions. Most importantly, the FAA's limited bases for judicial review expose parties to the risk of irrational or excessive arbitral awards that are unreviewable, barring a procedural irregularity. Without an enforceable agreement to expand judicial review, "a party might so fear the work of a maverick arbitrator that arbitration would not be an option." Goldman, *Contractually*

Expanded Review, 8 Harv. Negot. L. Rev. at 184. Moreover, businesses may face claims involving high financial stakes and could suffer a substantial monetary impact from a legally unsupportable arbitral award. *See* Younger, *Agreements to Expand the Scope of Judicial Review*, 63 Alb. L. Rev. at 251-2. When businesses cannot resolve their disputes through settlement negotiations or mediation, expanded judicial review for arbitral errors of law may be the *sine qua non* for them to agree to arbitrate their disputes, as the facts of this case indicate.

Commentators have noted the existence of certain "maverick," or legally unsupportable if not irrational, arbitral decisions which reviewing courts must nevertheless affirm under the FAA's limited standard of review. *See* Younger, *Agreements to Expand the Scope of Judicial Review*, 63 Alb. L. Rev. at 248 (discussing, as prime examples of aberrant arbitral decisions affirmed by judiciary, *Koch Oil, S.A. v. Transocean Gulf Oil Co*, 751 F.2d 551 (2d Cir. 1985), and *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994 (Cal. 1994)). In *Koch Oil*, for example, the Second Circuit affirmed a lump-sum arbitral award of $1,670,000 arising from contracts for crude oil exchange, even though the award far exceeded the contract price for undelivered oil and the agreement expressly disallowed recovery for lost profits and consequential damages. *See Koch Oil*, 751 F.2d at 554.[5]

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5 In *Advanced Micro Devices, Inc. v. Intel Corp.*, the California Supreme Court affirmed, under California's comparable

These cases serve as a cautionary tale to businesses considering arbitration, because the mere risk of arbitral excess can readily outweigh any of the perceived benefits of arbitration, especially when the financial stakes are high. To many, "arbitration [has become] a game of chance and an instrument of injustice." Younger, *Agreements to Expand the Scope of Judicial Review*, 63 Alb. L. Rev. at 250 (quoting *Advanced Micro Devices v. Intel.*, 885 P.2d at 1012 (Kennard, J., dissenting)).

Recent empirical studies indicate that sophisticated businesses are rejecting arbitration and are choosing not to include arbitration clauses in many of their commercial contracts.[6] While the reasons for this aversion to arbitration could be manifold, other recent data confirm that the absence of judicial review on the merits is a significant factor causing attorneys to steer their clients

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arbitration statute, Cal. Civ. Proc. Code § 1286.2, subd. (d), and § 1286.6, subd. (b), an arbitrator's award to a computer chip manufacturer of a license to make and sell a chip belonging to Intel, even though the manufacturer had no right to do so under the express terms of a technology exchange agreement with Intel. *See Advanced Micro Devices*, 885 P.2d at 1012.

6 For example, approximately 89% of 2,858 securities agreements filed with the SEC for the first half of 2002 contained no mandatory arbitration clause. *See* Eisenberg and Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 348-50 (2007).

away from arbitration.[7]

In light of this aversion to arbitration among many businesses and their counsel, a decision confirming parties' ability to contract for expanded judicial review could draw businesses back to arbitration as a viable alternative to litigation, thereby serving the interests of judicial economy. Whatever additional judicial resources courts might expend in reviewing substantive arbitral decisions would be insignificant compared to the judicial resources consumed in adjudicating entire cases, from the filing of a complaint to final judgment, as parties increasingly reject arbitration due to the absence of judicial review on the merits. "[A]rbitration with expanded judicial review . . . places a lesser burden on the judiciary than full litigation in the court system." Goldman, *Contractually Expanded Review*, 8 Harv. Negot. L. Rev., at 184 (with supporting authority at 184 n.82).

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7 A 2005 survey of business litigators in California showed that approximately 84% of the responding attorneys prefer litigation over arbitration most of the time, and that the absence of appellate review is a significant reason for this preference. Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum* 39-41 (Apr. 7, 2006) (unpublished manuscript) (available at http://law.bepress.com/expresso/eps/1248), *cited in* Henry S. Noyes, *If You (Re)Build it, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 Harv. J.L. & Pub. Pol'y 579, 588 n.30 (2007); *and* Eisenberg and Miller, *The Flight from Arbitration*, 56 DePaul L. Rev. at 350 n.72.

Some courts and commentators have expressed concern that expanded judicial review could involve courts in a difficult and compromising task of reviewing incomplete or cryptic arbitral records that lack written opinions, thereby requiring courts to enforce or vacate arbitral awards without a principled legal basis. *See, e.g., Bowen v. Amoco Pipeline, Inc.*, 254 F.3d 925, 936 (10th Cir. 2001); Cole, *Managerial Litigants?*, 51 Hastings L.J. at 1259. This concern is unfounded because the parties can require an arbitral statement of reasons, with findings of fact and conclusions of law, as did the parties in this case. A written decision should provide an adequate basis for judicial review, along with access to any relevant documentary or testimonial evidence. "It is likely that parties wanting expanded review will provide a record of the arbitration and require a written opinion." Goldman, *Contractually Expanded Review*, 8 Harv. Negot. L. Rev. at 186.

Courts that have ruled against parties' right to expand the FAA's standard of judicial review have rejected these contractual record-building measures on the basis that arbitration *ought not* entail such formal requirements as a legal opinion or trial-type record.[8] This concern is unfounded because, as amici have already

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8 "[E]xpanded judicial review would require arbitrators to issue written opinions with conclusions of law and findings of fact, further sacrificing the simplicity, expediency, and cost-effectiveness of arbitration." *Bowen v. Amoco Pipeline*, 254 F.3d at 936 n.7.

discussed above, this Court has held that the FAA does not prescribe any particular procedural rules and allows parties to define their own arbitral requirements, even when these requirements may affect the traditional simplicity and finality of arbitration. *See First Options of Chicago*, 514 U.S. at 947; *Volt Info. Sciences*, 489 U.S. at 469; *Dean Witter Reynolds*, 470 U.S. at 219-20.

Finally, it is worth noting that federal courts are seasoned in reviewing informal records under the Administrative Procedure Act, 5 U.S.C. § 706(2), and should be equally capable of reviewing arbitral decisions under similar standards of review. *See* Cole, *Managerial Litigants*, 51 Hastings L.J. at 1260. If parties who have contracted for expanded judicial review have failed to provide a record of the arbitral proceedings sufficient for judicial review on the merits, then the reviewing court would simply deny the aggrieved party's motion to vacate on that basis. *See* Goldman, *Contractually Expanded Review*, 8 Harv. Negot. L. Rev. at 187. *See also D.H. Blair & Co., Inc. v.Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (moving party has weighty burden of proof to establish ground for vacatur under FAA).

In sum, a decision recognizing parties' right to contract for expanded judicial review under the FAA would not only serve the FAA's fundamental purpose of upholding the parties' freedom of contract, but it would also rejuvenate arbitration as an attractive alternative to litigation. Such a decision would have the beneficial consequence of lessening the judiciary's caseload, with no

identifiable adverse consequences to the judiciary and substantial advantage to parties considering arbitration.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 06-989

In the
Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

v.

MATTEL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal courts of appeals, that the Federal Arbitration Act (FAA) precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioners. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for the resolution of disputes between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and freedom of contract in general, including *Cingular Wireless, LLC v. Mendoza*, 126 S. Ct. 2353 (2006); *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944 (2005), and *Gentry v. Superior Court*, No. S141502 (Cal. Sup. Ct. *petition for review filed* Feb. 28, 2006) (pending). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

The primary goal of the Federal Arbitration Act is to enforce the contractual rights of the parties to a dispute who have agreed to resolve their dispute through arbitration. While arbitration tends to be more efficient than judicial proceedings, contracting parties are free to agree to what appear to be inefficient methods of dispute resolution if that is their

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than amicus curiae, its members or its counsel made any monetary contribution specifically for the preparation or submission of this brief.

preference. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). If parties choose to add to their arbitration agreements the additional element of federal judicial review, no public policy goals are undermined by abiding by that choice. This Court should interpret section 10 of the FAA as providing *default* rules, not *immutable* rules, because the latter interpretation would not serve the FAA's goal of enforcing the contractual rights of parties who freely choose to adopt an arbitration agreement.

Courts that have ruled against allowing parties to expand judicial review of arbitration awards have relied largely on the theory that such agreements would violate the rule against creating federal jurisdiction by agreement. *See, e.g., Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991). But this fundamentally misunderstands the nature of jurisdiction under sections 9 and 10 of the FAA. That Act does not create jurisdiction at all; instead, parties seeking a judicial confirmation of an arbitration award under sections 9 and 10 are required to establish jurisdiction as set forth in the standard federal jurisdiction statutes, 28 U.S.C. §§ 1331 and 1332. Once those elements are satisfied, the district court has general jurisdiction, and the parties who agree to expanded judicial review are therefore doing nothing more than agreeing to certain procedural details for the hearing—as parties in lawsuits are generally allowed to do.

In addition, while some courts of appeals—notably the Seventh Circuit, in *Chicago Typographical Union* and *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 184-85 (7th Cir. 1985)—have contended that allowing expanded judicial review would undermine the efficiency of arbitration, that conclusion makes two basic errors: first, it places efficient dispute resolution above the freedom of contract as the guiding policy under the FAA. This Court has ruled otherwise. *Byrd*, 470 U.S. at 221; *Volt Info. Sciences, Inc. v. Bd. of Trustees of*

Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). Second, it rests on a faulty notion of "efficiency": an efficient agreement is not necessarily a *speedy* or *inexpensive* one; rather, it is whatever the parties find suits their needs, and if the parties freely agree to ask a federal judge to review an arbitration decision, that is, by definition, the most efficient arrangement between those parties.

Enforcing an agreement for expanded judicial review therefore is efficient if that agreement was voluntarily entered into by the parties. In addition, it serves the overriding concern of the FAA by ensuring that parties have their contractual agreements enforced. Allowing expanded judicial review of arbitration agreements does not violate rules against expanding federal jurisdiction, and does not otherwise undermine the judicial system. The decision below should therefore be reversed.

ARGUMENT

I

PARTIES SHOULD BE FREE TO ALTER THE DEFAULT RULES GOVERNING CONTRACTS

A. Freedom Means Choice

Freedom of contract is a fundamental principle of American law and society. It is not only a practical instance of constitutionally protected liberty, but it is probably the element of that liberty most frequently relied upon by ordinary Americans. As an aspect of individual liberty, freedom of contract "guarantee[s] to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties." Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293 (1975). At its core, freedom of contract simply *is* individual autonomy, and interference with that freedom constitutes an obstruction of the individual's freedom to pursue

his or her happiness. Brian A. Blum, *Contracts* § 1.4.1 (2d ed. 2001) ("[t]he power to enter contracts and to formulate the terms of the contractual relationship is . . . an integral part of personal liberty").

In addition, the consistent and predictable enforcement of voluntary agreements fosters social and economic prosperity, because it encourages entrepreneurship, investment, innovation, and exchange. When investors and traders can tailor agreements to meet their specific needs, they will be more willing and able to establish new businesses and to generate further prosperity. *See* Hernando de Soto, *The Mystery of Capital* 157 (2000) ("[l]aw is the instrument that fixes and realizes capital"); Nathan Rosenberg & L. E. Birdzell, Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* 116-17 (1986) ("a system of law which seeks to make the legal consequences of human action coherent and predictable . . . . reduce[s] the risks of trading and investing" and is essential to economic growth).

Along with concerns for individual freedom and economic efficiency, contract law must take into consideration certain problems of decentralized knowledge: namely, that third parties cannot know *a priori* what set of rules will best suit the individuals in an economy. Knowledge about particular circumstances is broadly distributed throughout society; it is not held by—and often is not even available to—a central authority. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945). Thus a contract law system that allows flexibility at the "local" level—*i.e.*, that allows contracting parties to tailor their agreements to suit their needs—will enable parties to use their knowledge and will avoid interfering with their freedom of choice in ways that increase inefficiency and, ultimately, the cost to the consumers. Businesses that can cater to a customers' specific needs, rather than strictly standardizing the terms of all orders beforehand, will increase consumer

satisfaction, and improve efficiency by ensuring that buyers are not given things they do not want.

Contract law creates default rules to ensure that if parties forget to include certain terms in their contracts, those contracts still will be enforced along with certain "gap fillers" for the unspecified terms which usually are designed to mimic what contracting parties would have wanted, had they considered the subject. *See, e.g.*, U.C.C. § 2-305 (1998) (allowing parties to contract even where no price term has been determined). While the law also creates certain binding limitations on contracts which parties may not negotiate around—civil rights laws, for example, or criminal laws which make certain contracts illegal—the more common sort of rule is a default rule, around which parties may freely devise their own agreements. The law allows parties to waive these rules because

> a meaningful power of exit is one important component of the concept of political freedom .... [A] person who may not "opt out" of a social arrangement is, to this extent, unfree .... [G]enuine consent implies the existence of meaningful alternatives . . . [and] in a free society, persons should have the power and right to contract around the background rules supplied by a legal system.

See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 904 (1992). *See also* Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419, 421 (2003) (legislatures should "make a particular rule a mandatory rule only if one of the parties to the contract is unable to protect itself from the other, or if the contract has effects on third parties who are unable to protect themselves. Otherwise, the rule should be a default rule.")

Given this "power to exit," contracting parties will tend to choose terms which suit their needs; this improves efficiency by ensuring that parties do not have their hands tied by provisions which they do not want. Contracting around default rules can be costly, but prohibiting parties from doing this can be even costlier. *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisc. L. J. 389, 402 (1993) ("[t]he state's choice of a default rule cannot affect the substance of private contracts . . . . [but] will affect total contracting costs").

Because freedom of contract is a basic exercise of liberty, and because a centralized authority simply cannot determine *a priori* the rules that "ought" to be part of every contract, legal restrictions on the freedom to contract around default rules must be justified by some important public reason. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 88 (1989) ("[t]here is surprising consensus among academics at an abstract level . . . [that] [i]mmutable rules . . . [are] justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves"). Where there is no social harm to be anticipated, or where that harm can be addressed by less intrusive means, parties should be free to negotiate to accomplish the things they wish to do, including determining the method of adjudicating possible future disputes. In short,

> freedom of contract is the general rule and restraint the exception . . . . In determining the validity of . . . [limits on the right to contract], regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting, and that it is only where enforcement conflicts with dominant public interests [that courts will refuse to enforce them.]

Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283, 288 (1932).

These principles apply to arbitration agreements as well. As this Court recognized in *Volt*, 489 U.S. at 479, the FAA allows "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," because this is consistent with the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." Because arbitration is a matter of contract, the parties to a dispute "are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." *Id.*

The FAA wisely *fosters*, but does not *dictate* agreements between private parties. It provides default rules which the parties may waive in order to bring their own preferences and knowledge to bear on a problem.

B. Allowing Parties To Tailor Their Agreements Encourages Efficiency and Prosperity

Professor Barnett explains that allowing parties to tailor their agreements to suit their particular needs benefits society as well as the parties themselves because it allows the parties to use their knowledge to accomplish results that could not have been foreseen by lawmakers at some other time and place. Barnett, *supra*, at 894. Morever, alterable default rules for contracts tend to balance out asymmetrical knowledge because if the default rule "is objectionable to the [more] knowledgeable party, [that party] will then explicitly contract around the default rule, and the process of explicitly contracting around that default rule will call the new rule to the attention of the rationally ignorant party, thereby giving that party a chance to

object as well." *Id.* at 895.[2] Thus a default rule can "reveal personal and local knowledge" and thereby increase the likelihood that agreements will actually represent a meeting of the minds. *Id.*

In addition to helping harness knowledge, allowing parties to negotiate around default rules increases efficiency by ensuring that parties are not given costly overprotection, or deprived of protections that they desire. Requiring parties to abide by certain terms in a contract when they do not want to will in many cases cost more than their agreement to waive those default protections, and whenever this happens, parties will contract around those rules. "A law of contract not based on [such] efficiency considerations will therefore be largely futile." Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 89 (1977).

Allowing parties to determine the terms of their own arbitration agreements therefore ultimately decreases costs to the consumer. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (2001) ("[r]elative to litigation, arbitration provides opportunities for a business to save on its dispute-resolution costs . . . [and] competition forces businesses to pass their cost-savings on to consumers"). A legal system which tries to predict what the contracting parties will want as part of their contracts must therefore "assume that individuals remain free to contract around that rule, and a legal system that denies private parties the right to vary rules in this way will tend to be less efficient than a system that adopts the same rules but

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[2] The fact that the parties to a dispute are more likely to know the relevant information better than any third party, and to be able to apply it efficiently is one reason why courts often adopt trade usage itself into the law. *See, e.g.*, U.C.C. § 1-205 (2007) (adopting "trade usage" as part of the Uniform Commercial Code).

permits contractual variation." Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 370 (1978). *See also* David D. Haddock, et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 Va. L. Rev. 701, 736 (1987) ("[t]he ability of firms to contract around costly legal rules when lower-cost private alternatives are available must be a feature of any efficient standard-form contract").

In the practical world of a dynamic economy, allowing parties to tailor their agreements to meet their specific needs is exceedingly important because each transaction is unique. Permitting parties the maximum freedom to arrange the terms of their transactions allows those who know most about the issues at hand to exert their knowledge and expertise.

This rationale lay behind the rise of a Medieval-era dispute resolution system known as the Law Merchant, of which modern arbitration is a descendant. *See generally* Bruce L. Benson, *The Enterprise of Law* 30-41 (1990). A private arbitration system for resolving cross-border disputes between commercial traders on the Mediterranean, the Law Merchant was popular in large part because it "developed to resolve commercial disputes involving highly technical issues. Merchant court judges were chosen from the relevant merchant community." *Id.* at 34. *See also* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 Hastings L.J. 1199, 1235 (2000) ("[a]rbitration as we know it was developed by the merchant class in medieval western Europe"). Parties to contracts could choose to have their disputes settled by private, for-profit arbitrators with expertise in the relevant trade. Even today, many private arbitration systems are available for people transacting business over the Internet, and they are favored by trading partners because they are faster and cheaper, and because the judges in these systems are trained in the subject matter of the dispute. *See generally* Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*,

41 Santa Clara L. Rev. 837 (2001). Because they are privately managed, these dispute resolution systems tend to be less time-consuming and more responsive to the needs of the consumers themselves; the judges tend to be more expert in the relevant trade; and the parties themselves can decide upon the terms for dispute resolution. "A market for law . . . produces better law than does a system in which government monopolizes lawmaking. The principles animating privatization around the world apply to lawmaking just as they apply to coal mining . . . ." Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 747 (1999).

II

THE FEDERAL ARBITRATION ACT WAS DESIGNED TO MAXIMIZE FREEDOM OF CHOICE

While arbitration and freedom of contract do tend toward greater efficiency, the primary goal of arbitration is not efficiency, but the maximization of freedom of choice. In *Byrd*, 470 U.S. 213, the Court, speaking through Justice Marshall, "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." *Id.* at 219. Instead, the FAA was designed "first and foremost . . . to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Id.* at 220. Parties may choose methods of dispute resolution that appear to be inefficient, and the Act calls for enforcement of those agreements.

As far as efficiency is concerned, any agreement to which the parties voluntarily enter is *by definition* efficient, because the only way to measure economic value, and thus to measure the optimality of an agreement, is to observe the fact that the

parties to a contract have, in fact, agreed to it. *See generally* James M. Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transactions Cost* (1984), *reprinted in* James M. Buchanan, 1 *The Logical Foundations of Constitutional Liberty* 260, 273-74 (1999) ("voluntary exchanges among persons, within a competitive constraints structure, generate efficient resource usage, *which is determined only as the exchanges are made*") (emphasis added). *See also* Israel M. Kirzner, *Market Theory and the Price System* 35 (1963) ("[e]fficiency for a social system means the efficiency with which it permits its individual members to achieve their several goals").[3]

But the primary purpose of the FAA is not to achieve efficiency, but to enforce the parties' agreement. The purpose of the FAA is to empower parties to settle disputes in the ways they choose, rather than to force them to submit to determination by the judiciary. Wharton Poor, *Arbitration Under the Federal Statute*, 36 Yale L. J. 667, 677 (1927) ("[t]he principle of arbitration is, in substance, no more than allowing the parties to select and pay their own arbiter rather than to have one thrust upon them by the government").

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[3] Any other measure of the efficiency of an agreement will necessarily substitute some other person's subjective speculations for the parties' own evaluations of the utility of their agreement, thus failing to account for the actual value of the agreement. *See* Buchanan, *supra*. For example, to hold that "wealth maximization" is the definition of utility will fail to account for those to whom wealth maximization is *not* a goal. *Cf.* Reza Dibadj, *Weasel Numbers*, 27 Cardozo L. Rev. 1325, 1359 (2006). To require an ascetic monk to take a course of action that maximizes his worldly goods will actually *impede* his utility maximization. Due to the fact that no outside observer can have the full knowledge of the utility functions of the parties to a contract, the *only* valid criterion for determining whether an agreement maximizes their utility is the fact that the parties themselves have agreed to the exchange.

Although at the time of the FAA's passage, many lawyers and judges recognized the greater efficiency and freedom of choice available through arbitration, *see, e.g.*, Alfred N. Heuston, *The Settlement of Disputes by Arbitration*, 1 Wash. L. Rev. 243, 243-44 (1926), the common law handicapped arbitration by prohibiting specific enforcement of arbitration agreements. *See Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (opinion of Stevens, J., concurring in part & dissenting in part). This meant that even if the parties had agreed before the dispute arose that they would settle any disagreements through arbitration, a party could later file a lawsuit in court; the court would refuse to stay the proceedings pending arbitration or to force the parties to submit to the arbitration as agreed.

The American Bar Association responded to this problem by drafting federal legislation which would incorporate arbitration into the federal judicial system, allowing disputes to be resolved by arbitration first, and then confirmed by the federal courts. The Congress that debated and then enacted the FAA argued about many issues, but generally agreed that arbitration agreements "are purely matters of contract, and [that] the effect of the [FAA] is simply to make the contracting party live up to his agreement .... An arbitration agreement is placed upon the same footing as other contracts, where it belongs." H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1 (1924). *See also* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L. Rev. 101, 149 (2002) (quoting Rep. Graham: "[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement . . . to arbitrate, when voluntarily placed in the document by the parties .... It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to"). Nothing in the text or history of the FAA

suggests that Congress intended to prevent parties from choosing to expand the degree of judicial review to which their arbitration would be subjected. *See* Milana Koptsiovsky, Note: *A Right to Contract for Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 Conn. L. Rev. 609, 615 (2004) ("[n]owhere did the legislative history state that a court is precluded from enforcing a contract on its own terms if the contract expands the FAA").

Under the terms of the FAA, contracting parties who anticipate arbitration have a great deal of flexibility in choosing the terms of dispute resolution. First, they may choose to opt out of judicial confirmation under the FAA entirely. *See* section 9 ("[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . [then] the court must grant such an order . . . .").

In addition, they may choose the forum in which the arbitration is heard, the arbitrator and the rules of procedure, and which state's *substantive* law shall govern a dispute. *Cf. Volt*, 489 U.S. at 476 ("[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"). This last is particularly important because if parties may choose the body of law that governs disputes—whether it be the law of a forum state or even private religious traditions, *see, e.g., Elmora Hebrew Ctr. v. Fishman, Inc.*, 570 A.2d 1297 (N.J. Super. Ct. 1990) (enforcing decision of religious arbitrators)—then there would appear to be little reason not to allow the parties to also choose federal law to govern their disputes. And because parties also may agree as to *who* shall resolve a dispute, there is little reason for concern if they choose a federal district court judge to review their dispute at some stage of the process, so long as they have properly established federal jurisdiction.

In short, if each of the substantive elements of *de novo* review may be adopted by contract between the parties without violating any law or any person's rights, then there is no reason that contracting parties should be prevented from bundling those elements together by calling for *de novo* review by a federal judge in their arbitration agreement. Doing so is just another way of stating that the parties have chosen as part of their enforceable agreement to undergo a round of arbitration before potentially asking a federal judge to review that arbitration award. If such a term is incorporated into the agreement, a federal court that applies *de novo* review later is simply enforcing the terms of the contract as contemplated by section 9 of the FAA.

The FAA's focus on maximizing freedom of choice and enforcing the agreements that parties freely make indicates a more general concern with autonomy among contracting parties which, as Professor Cole has argued, ought to be respected by courts so long as the choices contracting parties make are consistent with a stable application of the rule of law. If a statute authorizes the court to grant the parties' request for expanded judicial review, argues Cole, and if doing so would not undermine the court's institutional integrity, then courts should allow the parties to expand their agreements and incorporate judicial review. Cole, *supra*, at 1232. Because the language of the FAA is amenable to both the argument that no expanded review is permissible, and that parties may expand judicial review, the broader legislative goal of freedom of contract should prevail, and parties should be allowed to exercise their knowledge to accomplish their goals—*i.e.*, to contract for greater review. This Court should therefore read section 10's factors as *default* rules, not immutable rules.

Section 10 sets out background standards which will govern if the parties express no desire to the contrary, and parties should not be barred from contracting around these defaults except where some social harm is to be anticipated

from their doing so. This interpretation is not contrary to the language of the FAA, and is consistent with the purpose underlying that legislation. It therefore ought to prevail. *See Smith v. Townsend*, 148 U.S. 490, 494 (1893):

> [F]or the sure and true interpretation of all statutes . . . four things are to be discerned and considered: First. What was the common law before the making of the act. Second. What was the mischief and defect for which the common law did not provide. Third. What remedy the [legislature has] resolved . . . . Fourth. The true reason of the remedy.

Quoting *Heydon's Case*, (1584) 76 Eng. Rep. 637, 638 (K.B.); *accord, Pierson v. Ray*, 386 U.S. 547, 561 (1967) (applying *Heydon's Case*). Aside from cases where the arbitration agreement for some reason fails to represent a meeting of the minds—cases already covered by section 10—there does not appear to be any social harm to be anticipated from allowing parties to request further review of arbitration decisions by a federal judge. On the contrary, if the parties agree to such review, social harm results from *failing* to enforce that agreement: it undercuts the primary purpose of the Act, increases inefficiency, and intrudes on the freedom of choice of contracting parties.

Allowing parties to decide the terms for the resolution of their disputes maximizes individual satisfaction, increases social efficiency, improves the accuracy of resolution, respects the autonomy of the parties, and fits well with long-standing common law rules recognizing that the parties themselves probably know best how their disputes should be resolved. Section 10's specified grounds for denying the confirmation of an arbitration award therefore should be interpreted as default rules to which parties may knowingly add others if they so choose. Alan Scott Rau, *Contracting Out of the Arbitration*

Act, 8 Am. Rev. Int'l Arb. 225, 231 (1997) (section 10's provisions are "not . . . imperative command[s] of public policy," but "a ready-made stock of implied terms" which "may naturally be varied by an express agreement of the parties").

As Professor Rau has put it, the FAA was intended to ensure that parties who agree to arbitration "need not fear an officious or meddlesome inquiry into the merits which would impair the efficacy of the arbitral process for them." Rau, *supra*, at 231. But this purpose has nothing to do

> with the situation where the parties are eager to depart from the protective rule of § 10. It is one thing to say that their awards must have legal currency in accordance with the parties' presumed wishes—it is something totally different to say that their awards will have this currency, by God, over the parties' expressed wishes to the contrary.

Id. For a court to declare that it will not review an arbitration award even though the parties themselves agree to this would simply be a "paternalistic" "interference with private autonomy." *Id.* Indeed, as Justice Harlan Stone put it in 1923, shortly before the enactment of the FAA, "that two merchants of full age and mental competency should not be permitted by the laws of their country to stipulate for the adjustment and settlement of controversies between them . . . would seem incredible to a layman." Quoted in *Advantages Ascribed to Arbitration*, 9 J. Am. Jud. Soc. 73, 78 (1925).

III

PARTIES WHO EXPAND JUDICIAL REVIEW OF THEIR ARBITRATION AGREEMENTS UNDER THE FAA ARE NOT "CREATING JURISDICTION BY CONTRACT"

The primary concern of the court below, as well as the other circuits which have taken the same position, is that

allowing *de novo* review of those agreements by federal courts would be tantamount to creating federal jurisdiction by agreement, which parties obviously may not do. *See, e.g., Chicago Typographical Union*, 935 F.2d at 1505.

But the FAA does not confer jurisdiction. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). Any federal district court hearing a matter under the FAA's confirmation provisions must have jurisdiction established on a basis provided for by 28 U.S.C. §§ 1331 or 1332. And assuming that the jurisdictional requirements of *those* statutes are satisfied, the parties to an arbitration dispute who come before a district court are not manipulating or expanding the court's *jurisdiction* when they agree to the terms on which the court may deny a confirmation order. They are merely choosing the *procedures*, or the standard of review, for a confirmation proceeding. Parties are not only entitled to do this under the FAA, but are usually allowed to govern the procedural details of their cases under the general principles of case management which allow them to stipulate to such matters as waiving a jury. *See, e.g.*, Fed. R. Civ. P. 39(a) (allowing wavier of jury by stipulation).

The situation would be different if the parties to the arbitration were to agree that their arbitration agreement could be reviewed by a court of appeals, or by this Court, which would not have original jurisdiction under federal statute, or if parties whose dispute is not within the original jurisdiction of the district court asked a court to review it anyway. But where a district court *does* have personal and subject matter jurisdiction over a case, then the contracting parties are doing nothing that is not already done by the FAA when they agree to have a federal judge review their arbitration matter for errors other than those explicitly listed in section 10. Rau, *supra*, at 227-28.

As Judge Kozinski put it in his opinion in *Kyocera*, parties may not "impose on the federal courts burdens and functions that Congress has withheld," but so long as a case has "an independent jurisdictional basis" authorizing review under the FAA, then judicial review is substantively no different than the enforcement of the arbitration agreement itself, and the court is acting just as it would "in appeals from administrative agencies and bankruptcy courts, or on habeas corpus." *LaFine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

In *Chicago Typographical Union*, Judge Posner cited four cases to support his view that contracting for expanded judicial review of arbitration awards counted as "creating jurisdiction by agreement": *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987); *Indep. Employees' Union v. Hillshire Farm Co., Inc.*, 826 F.2d 530, 532-33 (7th Cir. 1987); *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987); and *Ethyl Corp.*, 768 F.2d at 184-85. But none of these cases is applicable to an agreement such as this one.

In *Misco*, this Court found that federal courts may not review arbitration agreements regarding collective bargaining contracts, because such review would undermine the policies underlying "federal statutes regulating labor-management relations." *Misco*, 484 U.S. at 37. Federal labor laws were designed to organize "'settlement of grievance disputes arising over the application or interpretation of the existing collective-bargaining agreement,'" *id.* (quoting 29 U.S.C. § 173(d)). But the policies involved in the FAA have nothing to do with the efficient and fair settlement of labor disputes. Unlike the situation with labor contracts, a case such as this one involves no governmental attempt to remedy an alleged imbalance of bargaining power to suit political needs; rather, a case like this involves mature parties able to bargain for themselves at arm's length, and to reach a mutual agreement. The primary goal of federal labor laws is to reach a rapid and politically acceptable

settlement between labor and management. The primary goal of the FAA, by contrast, is to enforce the parties' agreements.

Moreover, the agreement here included a provision for judicial review, which was not the case in *Misco*. There, the Court was concerned that " 'the moving party should not be deprived of the arbitrator's judgement, when it was his judgment and all that it connotes that was bargained for.' " *Id.* at 37 (quoting *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)). Here, both parties bargained for review by a federal judge, and they are not being "deprived" of anything.

Likewise, the arbitration agreement in *Hillshire Farm* did not contain a provision allowing for judicial review of the arbitration award. That case, too, involved arbitration under a collective bargaining agreement; the union brought suit in state court to vacate part of the arbitration award on various state grounds, and the employer removed the case to federal court pursuant to the Labor Management Relations Act, 29 U.S.C. § 185 (1982). *See Hillshire Farm*, 826 F.2d at 532. The district court ruled for the union, and although the court of appeals reversed, it found that the case was properly brought because under the Labor Management Relations Act, a party was entitled to seek judicial review in certain "extremely narrow" circumstances. *Id.* This policy reflects the fact that "parties to a collective bargaining agreement have bargained for arbitration as a dispute resolution process and fosters that process." *Id.* Thus, unlike the situation here, the parties in *Hillshire Farm* had not agreed to judicial review of the final arbitrator's decision, and the limited judicial review applicable in that case was based on public policies regarding collective bargaining and labor management, which are not applicable here. The arbitration agreement in *Hill* also involved a collective bargaining contract, and there was no indication of an agreement between the parties for expanded judicial review. *See* 814 F.2d at 1194.

In *Ethyl Corp.*, Judge Posner provided a more thorough explanation of why he believed judicial review of arbitration awards is not available—although in that case, too, there was no indication that the parties agreed to such review, as they did in this case. *See* 768 F.2d at 183. There, he explained that allowing judicial review "tends to judicialize" the arbitration process. *Id.* at 184. This is inappropriate, he argued: the point of arbitration is "to provide an alternative to judicial dispute resolution, not an echo of it," and allowing judicial review of arbitration would create pressure for arbitrators to act more like courts. *Id.* Moreover, allowing judicial review would "make arbitration a three-tiered, rather than as in normal adjudication a two-tiered, process," because first arbitrators, then district courts, then circuit courts, would review a decision. This "would make arbitration more judicial than adjudication." *Id.* In *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (*en banc*) the Ninth Circuit echoed these arguments, concluding that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."

While these may all be good arguments against including a provision for judicial review in an arbitration procedure, they are not good reasons for defeating the parties' own agreement to create such a three-tiered process. The point of arbitration, as the Court in *Byrd*, emphasized, is *not* primarily to ensure that disputes are resolved quickly, or to force parties to adopt any particular method of dispute resolution, but "to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements . . . even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Byrd*, 470 U.S. at 221.

The Seventh Circuit's concerns about "judicializing" arbitration is an appropriate concern where judicial review is engaged contrary to the wishes of a party, but if the parties wish to create such review, their will must prevail. The *Byrd* Court was "not persuaded" that any "conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter." *Id.* Instead, enforcing "the contractual rights of the parties" is the principal goal of the FAA *Id.*

Fortuitously, this does not mean that courts must sacrifice efficiency, because if an arbitration agreement truly represents the will of the parties, then it *is* the efficient method of resolving the dispute. The parties would not have freely agreed to an arbitration method if that method did not answer their concerns in the way they thought most economical, and to bar them from their agreement is therefore to deprive them of that additional utility which their preferred agreement provides them. *See* Buchanan, *supra*; Donald J. Boudreaux, et al., *Talk is Cheap: The Existence Value Fallacy*, 29 Envtl. L. 765, 785 (1999) ("[i]n market transactions, we can assume that all individual trades increase individual utility, because the occurrence of the trade itself suggests that the individual values the good received more highly than the good surrendered").

CONCLUSION

The decision of the Court of Appeals should be *reversed*.

DATED: July, 2007.

Respectfully submitted,

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No. 06-989

In the Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,
PETITIONER,
v.
MATTEL, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should parties to an arbitration agreement be permitted to consensually expand judicial review of arbitral awards beyond the specific grounds set out in the Federal Arbitration Act for setting aside and vacating an arbitral award where the Act makes no provision for such an extension?

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STATEMENT OF INTEREST

The United States Council for International Business (the "USCIB") submits this brief as amicus curiae in support of respondent, Mattel, Inc. (the "Respondent").[1]

Founded in 1945, the USCIB promotes free trade and represents U.S. business interests before international and intergovernmental entities. Among its many roles, the USCIB represents the central values, ideas, and common interests of U.S. international businesses before U.S. policymakers, and officials in the United Nations, the European Union, and other governments and organizations. As an affiliate, the USCIB represents the U.S. international business community in the International Chamber of Commerce ("ICC"), the world business organization created in 1919 to promote trade and investment, open markets, and the free flow of capital.

Because of the vital role that arbitration plays in international business, the USCIB also represents the interests of the U.S. business community in connection with the ICC's international arbitration functions. The International Court of Arbitration®, established in 1923, is the world's leading institution for international commercial arbitration. International arbitration practitioners appointed by the USCIB play key roles in ICC arbitration proceedings, on the ICC Commission on Arbitration, and other ICC arbitration bodies. U.S. parties are among the principal users of the International Court of Arbitration®. In addition, U.S. cities have been consistently among the top five most frequently selected cities as places of arbitration at the International Court of Arbitration®. Int'l Ct. of Arb. [ICA], *Place of Arbitration: Most Frequently Selected Cities (1998 – 2006)*, March 2007.

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[1] Letters of consent from Petitioner and Respondent have been submitted concurrently with this filing. No counsel for any party has authored this brief in whole or in part and no person or entity, other than amicus curiae, its members or its counsel, made any monetary contribution specifically for the preparation or submission of this brief. S. Ct. R. 37.6.

This case has broad implications for U.S. businesses that are frequent users of arbitration. The USCIB seeks to provide the Court with the perspective of the U.S. international business community as to why the position of Hall Street Associates, L.L.C., (the "Petitioner") should not prevail.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case constitutes a critical moment in the development of the jurisprudence of arbitration law in the United States. At stake is the long-held precept that arbitration awards are final and should be free from judicial interference. Finality of arbitration awards and freedom from judicial interference characterize the arbitration process and are central to the viability of arbitration as an alternative to litigation. Expanded judicial review of arbitral awards would vastly transform the landscape of arbitration and significantly undermine the viability of arbitration as a form of alternative dispute resolution.

This Court has previously refused to interpret the Federal Arbitration Act (the "FAA") in a manner that would "undermin[e] the FAA's proarbitration purposes" and "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 275 (1995). Relitigation of disputes already submitted to the arbitral process, which is designed to avoid litigation, is precisely what the Petitioner seeks to do by asking this Court to sanction arbitration agreements where parties agree to finally resolve their dispute through a judicial, rather than an arbitral, process.

Despite the absence of any provision in the FAA permitting review for errors of law, Petitioner argues that the FAA nevertheless allows parties to contractually expand the court's statutory power of review. Petitioner advances two main points. First, Petitioner submits that the FAA does not prescribe the exclusive grounds for judicial review of an arbitral award. Second, Petitioner

contends that providing for expanded judicial review of arbitral decisions is not inimical to the policy underlying the FAA and arbitration generally.

Neither of Petitioner's submissions are supported by the FAA, its legislative history, nor case law interpreting it. Petitioner cannot be correct that parties can somehow consensually confer jurisdiction on the court to review arbitration awards in circumstances where the court has none. The circumstances surrounding the advent of the FAA support a narrow construction of the court's power of review. Tellingly, Congress modeled critical provisions of the FAA on the 1920 New York Arbitration Act—an act that embodied the principles of the reform movement and provided for limited judicial review—and rejected the approach under the 1917 Illinois Arbitration Statute—which provided for extensive judicial intervention on questions of law.

Arbitration is attractive to the international business community because it provides finality and certainty while also achieving other goals such as speed and efficiency. Arbitration enjoys the support of the courts because it advances a social good by providing a practical alternative form of dispute resolution while conserving scarce judicial resources. Permitting expanded judicial review of arbitral awards on issues of law and fact will sanction any number of exotic hybrid forms of dispute resolution that will provide few of the benefits of arbitration and many of the disadvantages of litigation. These mutations are inimical to the U.S. tradition of commercial arbitration, the hallmark of which has been limited judicial review. They are also inconsistent with the policies underlying the FAA, which was to secure recognition of arbitration as a meaningful alternative to judicial proceedings rather than merely a costly prelude to litigation.

ARGUMENT

I. EXPANDED JUDICIAL REVIEW IS CONTRARY TO THE ETHOS OF ARBITRATION

A. Finality Is An Indispensable Characteristic Of Arbitration

Expanded judicial review is antithetical to finality—an indispensable and irreducible characteristic of the arbitral process—and undermines arbitration as an efficient alternative means of resolving disputes. Many businesses—particularly those involved in international transactions—choose to resolve disputes through arbitration because it provides a more efficient alternative to litigation that yields a final result in the first instance and that is subject to judicial review only on very narrow grounds. Arbitration and litigation are very different modes of dispute resolution and one of the key distinctions is judicial review. As this Court has recognized, a party agreeing to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also First Options of Chicago Inc., v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute . . . But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value."); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) ("Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are *willing to accept less certainty of legally correct adjustment.*") (emphasis added) *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

But arbitration can achieve the goal of finality only if it results in an award that can be set aside for very limited reasons. Review of arbitral awards must therefore be

limited to the "bare essentials needed to afford due process and to protect the state's own interests." Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 147 (1997).

B. Increased Judicial Review Deprives Parties Of Arbitration's Supposed Benefits And Prevents Arbitration From Being An Alternative Means Of Dispute Resolution

Arbitration cannot provide a meaningful alternative to litigation if the process concludes with the losing party searching for arguable errors of law to bring before the courts. Relitigation of matters that were supposed to be resolved in arbitration is wastefully duplicative and increases the time and cost of resolving disputes. Increased judicial review will also incentivize losing parties to challenge arbitral awards more frequently, and perhaps on more spurious grounds.

Parties can therefore only use arbitration as an efficient means of dispute resolution if arbitrators are the final arbiters of findings of both fact and law. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

Expanded judicial review also delays resolution of the parties' dispute. Instead of providing simple, informal, and expedited resolution, arbitration would be an expensive and time-consuming dress rehearsal for potentially lengthy, inefficient, and costly litigation. *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) ("[E]xtensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings."); Hans Smit, *Contractual Modification of the Scope of*

Judicial Review of Arbitral Awards, 8 Am. Rev. Int'l Arb. 147, 149 (1997) ("[I]f arbitral awards could be reviewed for errors of law or fact, arbitration would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts."). Parties would then be trading litigation not for arbitration, but for arbitration that is very likely to be followed by *additional* substantive litigation. Neither process provides the quick and efficient resolution of disputes that arbitration standing alone would provide.

Contracting for expanded judicial review of arbitral awards will invariably introduce into arbitration the delays and costs traditionally associated with resolving disputes through litigation. Allowing the parties to create complicated procedural hybrids that cannot function without extensive judicial involvement is a perversion of the goals of arbitration. This Court has recognized that arbitration was established as "an alternative to the complications of litigation," and has specifically noted delay and expense as those characteristics of litigation that arbitration is intended to avoid. *Wilko*, 346 U.S. at 431. A draftsperson of the Uniform Arbitration Act recognized that "[i]f the parties can go to court on questions of law, then . . . you would have added just one more step to your ordinary trial procedure and you would defeat the whole purpose of this quick and relatively inexpensive proceeding." *Proceedings in Committee of the Whole of the Nat'l Conference of Comm'rs on Unif. State Laws* 1, 50H (1954) (statement of Mr. Davis).

Arbitration requires final and definitive resolution of disputes, free from the risk of protracted litigation. If arbitration is regularly followed by challenges to the arbitral award, the efficient resolution of disputes—a hallmark of arbitration—will disappear. Expanded judicial review of arbitration awards will significantly increase the cost of resolving disputes through arbitration and will necessarily deprive parties of a means of dispute resolution intended to be more expeditious and cost effective than litigation.

II. EXPANDED JUDICIAL REVIEW IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE FAA, THE PLAIN TEXT OF THE FAA, AND STATEMENTS BY THIS COURT

A. The Legislative History Of The FAA Reveals That Congress Intended To Preclude Judicial Review On Questions Of Law

The passage of the Federal Arbitration Act was the culmination of an arbitration reform movement intended to make agreements to arbitrate fully enforceable. The model for the FAA was the New York Arbitration Act of 1920 (the "New York Act"), which was considered the nation's first "modern" arbitration statute. Ian R. Macneil, *American Arbitration Law*, 34-37, 84-88 (1992) [hereinafter *American Arbitration Law*]. Indeed, the operative language of Section 2 of the FAA is virtually identical to Section 2 of the New York Act. *Id.* at 106. Since Section 2 of the FAA was lifted from Section 2 of the New York Act, "[a]ny starting point of historical analysis must, therefore, be the New York act."[2]

The language of Section 2 of the New York Act and the FAA, was a response to the common-law doctrine that agreements to arbitrate were revocable—and therefore unenforceable—up until the point an award was rendered. The language of the two statutes—providing that agreements to arbitrate are valid, irrevocable and enforceable—was a legislative reversal of this restrictive

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2 Section 2 of the New York Act stated:

> A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, *shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

1920 N.Y. Laws, ch. 275, § 2 (emphasis added). This language is tracked in Section 2 of the FAA, which states that agreements to arbitrate "shall be valid, irrevocable, and enforceable save upon such ground as exist at law or in equity for the revocation of any contract."

common-law doctrine. *American Arbitration Law* at 106.[3] It was decidedly not intended to give license to the parties to contractually agree upon their own standards of judicial review.

Indeed, an important tenet of the reform movement was limited judicial review, a feature that was also reflected in the New York arbitration scheme and incorporated into the FAA. The other major competing state arbitration act of the era was the Illinois Arbitration Statute of 1917 (the "Illinois Statute"). In stark contrast with New York law, which provided for limited judicial review, the Illinois Statute provided for significant judicial intervention throughout the arbitral process on questions of law. *American Arbitration Law* at 34-35. Section 6 of the Illinois Statute provided that the arbitrators must, at the request of a party, "submit any question of law arising in the course of the reference for the opinion of the court" or reach conclusions of fact that were then submitted to the court for an opinion on "questions of law arising" that would bind the parties. *Id.* at 31-32.

Although the main focus of the reform movement was on reversing the doctrine of revocability, the reformers also viewed the enhanced judicial involvement of Section 6 of the Illinois Statute as a retrograde step:

> [S]ection 6, with its shifting of determination and application of law from the arbitrator to the courts, was also anathema to the reformers. True, less is to be found in the reform discussion of this issue than of revocability, but this reflects only a lesser need to raise the issue, not its lesser importance.

Id. at 33 (footnote omitted). Limited judicial review was an

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[3] The term "enforceability," was included in the "New York formula," and later picked up in Section 2 of the FAA, only as a "prelude to provisions for specific performance remedies ... in succeeding sections of the statute." *Note: Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 Yale L.J. 847, 854-55 (1960), *quoted in American Arbitration Law* at 106 n.27.

important element of the reform movement's formulation of arbitration as a distinctly different and non-judicial mode of dispute resolution. As it was the other major state arbitration statute, Congress was undoubtedly aware of the Illinois Statute's more interventionist approach. In declining to adopt the Illinois model , and instead enacting an act based on the reform model, Congress endorsed a view of arbitration that provided only for limited judicial review.

The concept that courts should only intervene in narrow circumstances is also reflected in the legislative reports during the passage of the FAA:

> If the parties to the arbitration are willing to proceed under it, they *need not resort to the courts at all*. . . [T]he party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the *arbitration proceeds without interference by the court.*

H.R. Rep. No. 68-96, at 2 (1924) (emphasis added).

Indeed, the view of arbitration Congress endorsed in the FAA has been a part of the federal courts' understanding of arbitration for over 150 years. Although the revocability doctrine may have impaired the practice of arbitration before the enactment of the modern state statutes and the FAA, the federal view of arbitration has historically been non-interventionist. In *Burchell v. Marsh*, 58 U.S. 344 (1854), Justice Grier expressed what was, in many ways, a "modern" theory of arbitration that the reformers of the 1920s would have recognized as consistent with their own conception of arbitration:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for

> error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, (Knox *v.* Symmonds, 1 Ves. Jr. 369,) "to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award."
>
> Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

58 U.S. at 349-50. [4] In the main, therefore, it must be said that the American tradition of arbitration is inconsistent with expansive judicial review.

The FAA's emphasis on enforcing the parties' agreement to arbitrate does not, therefore, explicitly or

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[4] Later in the opinion, Justice Grier wrote that:

> The admission of witnesses to prove their estimate of the damages (even if it had been in the face of the objection of counsel, and not by consent) may have been an error in judgment, but it is no cause for setting aside the award; nor can the admission of illegal evidence, or taking the opinion of third persons, be alleged as a misbehavior in the arbitrators which will affect their award. If they have given their honest, incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award because it thinks it could have made a better.

Id. at 351-52.

implicitly endorse arbitration agreements providing for review for errors of law and was never intended to do so.

B. The Text Of The FAA Evinces Congressional Intent To Limit Judicial Review Of Arbitral Awards

The text of the FAA directs that, unless one of the enumerated exceptions applies, a court must confirm an arbitral award brought before it. Under Section 9 of the FAA, any party may apply for an order confirming an award, and the court must grant such an order unless one of the grounds in Sections 10 and 11 applies:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title* [9 USCS §§ 10, 11].

9 U.S.C. § 9 (emphasis added). Section 10 provides that the court may vacate an arbitral award:

> (1) where the award was procured by corruption, fraud or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (a). Under Section 11, the court may modify or

correct the award only:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. Read together, these sections require the court to confirm an arbitration award except in a limited number of circumstances, even if the award is a product of legal error. Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 180-81 (2003).

Notably, none of these sections—nor any other section in the FAA—permits parties to contractually alter the grounds on which the court may refuse to confirm an award under Section 9. The FAA regime unambiguously delineates a limited role for a reviewing court. *See, e.g., Florasynth, Inc. v. Pickholtz*, 750 F.2d 171, 176-77 (2d Cir. 1984) ("An examination of the underlying purpose of the arbitration mechanism amply demonstrates . . . [that] the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."). Moreover, this Court, and lower federal courts, have recognized that arbitration should generally be free from judicial oversight. *Eastern Associated Coal Corp. v. United Mine Workers of Am., District 17*, 531 U.S. 57, 62 (2000) (noting that "courts will set aside the arbitrator's interpretation of what [an] agreement means only in rare instances."); *see, e.g., Saxis Steamship Co.*, 375 F.2d at 581-82 ("We have made it quite

clear on earlier occasions that it is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law or fact.").

The lead-in clause to Section 9 cannot, as Petitioner suggests, constitute congressional indication that confirmation of an award should be conditional on a judicial standard agreed to by the parties. Given that Congress had explicitly enumerated specific exceptions to the FAA's otherwise mandatory instruction to confirm arbitration awards, Congress would have provided for any supposed exception to the FAA's imperative to enforce awards explicitly. Instead, as discussed above, the legislative history indicates that Congress expressly intended the judicial confirmation of an arbitral award as a mandatory directive, which does not allow for private modification:

> The award must be in writing and acknowledged. Within one year after it is made, any party may apply to the court specified in the award, or to the Federal court in the district wherein the award was made, for judgment to be entered upon the award. This *must* be granted as a matter of course, unless the award is vacated, modified, or corrected. (Sec. 10.) The grounds for vacating, modifying, or correcting an award are limited. If the award was procured by corruption, fraud, or undue means, if there was evident partiality or corruption upon the part of an arbitrator, if the arbitrators were guilty of misconduct or misbehavior, if they exceeded their powers or failed to make a mutual final, or definite award, then and *then only* the award may be vacated.

Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings Before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. 34 (1924) (brief of Julius Henry Cohen, General Counsel of the New York Port

Authority and New York Chamber of Commerce, and drafter of the 1920 New York Act) (emphasis added). The text and legislative record of the FAA indicate that the grounds under which a federal court may review an arbitral award outlined in the FAA are exhaustive. Because the FAA does not contain an exception for party agreement, parties themselves cannot by agreement derogate from the explicit statutory mandate to confirm awards without reviewing the award for errors of law.

C. This Court Has Repeatedly Recognized That Judicial Review Of Arbitration Awards Is Extremely Narrow And Derives From The Grounds For Refusing To Confirm An Award In The FAA

Consistent with the roots of the FAA in the reform movement, this Court has repeatedly affirmed that the judicial review of arbitral awards under the FAA is extremely limited. *First Options of Chicago, Inc.*, 514 U.S. at 942-43 ("The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside *only in very unusual* circumstances . . . the court should give considerable leeway to the arbitrator, setting aside his or her decision *only in certain narrow* circumstances.") (emphasis added); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("judicial review of an award is more limited than judicial review of a trial. . . ."); *Wilko*, 346 U.S. at 436 ("Power to vacate an award is limited.").

This Court and the federal courts have not, as Petitioner argues, recognized additional, non-statutory grounds for judicial review of arbitral awards, but have rather further interpreted the existing statutory grounds for judicial review, by filling interstices in the FAA that have become apparent after its enactment. In *Wilko v. Swan*, this Court recognized that the grounds in Section 10 included manifest disregard of the law.

> Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure

> of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions . . . the interpretation of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.

346 U.S. at 436-37. This Court thereby clarified that the grounds for vacating an arbitral award under Section 10 of the FAA included those instances when the award reflected a manifest disregard of the law, but that an arbitrator's award is not otherwise reviewable for errors of law.

Additional grounds that are not expressly enumerated are nonetheless derived from the statutory list. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990) (discussing the "other grounds, derived from the statutory list," such as "manifest disregard of the law" and "arbitrary and capricious"); *Saxis Steamship Co.*, 375 F.2d at 581 (holding that when reviewing an arbitral decision, "the role of the court is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in § 10 of the [FAA]").

Even where federal courts have discussed appropriate statute-derived grounds for vacating and modifying an arbitral award, they have nonetheless emphasized the presumption in favor of affirming an arbitral award. *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986) ("We review the Panel's award mindful that confirmation is required even in the face of "erroneous findings of fact or misinterpretations of law" . . . An arbitrator's decision must be upheld unless it is "completely irrational," or it constitutes a "manifest disregard of the law.") (citations and quotations omitted);

Hoffman v. Cargill, Inc., 236 F.3d 458, 461-62 (8th Cir. 2001) ("courts tread lightly in reviewing arbitration awards. "The courts' review of arbitration awards is extremely narrow" . . . These extra-statutory standards [of irrationality or manifest disregard for the law] are extremely narrow . . .") (quoting *Executive Life Ins. Co. v. Alexander Ins., Ltd.*, 999 F.2d 318, 320 (8th Cir. 1993)); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330-31 (1st Cir. 2000) ("Beyond the specific grounds enumerated in § 10, courts 'retain a *very limited* power to review arbitration awards.'") (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990)) (emphasis added).

III. PRIVATELY DRIVEN JUDICIAL REVIEW OF ARBITRAL AWARDS WILL TAX ALREADY STRAINED JUDICIAL RESOURCES AND PROLIFERATE COSTLY LITIGATION

A. Privately Driven Judicial Review Of Arbitral Awards Would Decrease Judicial Efficiency And Place Undue Burdens Once Shouldered By The Arbitration System Onto The Federal Court System

While party autonomy is an important feature of arbitration practice, the virtually unlimited autonomy advocated by the Petitioner would transform arbitration into a hybrid form of dispute resolution that would undermine the principle of finality and tend to tax, rather than conserve, judicial resources.

Arbitration without enhanced judicial review provides parties with flexibility to tailor the dispute resolution process. Parties may specify issues to be resolved through arbitration and issues to be resolved in litigation. If they are particularly eager for courts to resolve an issue, they can provide for it. Parties may select from a variety of institutional rules to govern the proceedings, develop their own rules and procedures, or leave the rules to the arbitrators. They can decide whether rules of evidence should apply and select the substantive law governing the dispute. They have the freedom to determine the

arbitrators' qualifications and the manner in which they should be selected. In short, arbitration provides sufficient flexibility for parties to customize the process.

But party autonomy reaches its limit at the point that it transforms arbitration into another creature altogether. This Court should not issue an open invitation to parties and their lawyers to devise toothless hybrid regimes that would "render[] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Kyocera Corp. v Prudential-Bache T Servs.*, 341 F.3d 987, 998 (9th Cir. 2003), *cert. dismissed*, 540 U.S. 1098 (2004); *see also* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 181-82 (2002) (noting that arbitration procedures that leave significant issues for judicial resolution create "costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public "do-overs." Expanded review agreements similarly create hybrid, two-step procedures that waste public and private resources. . ."); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 151 (allowing private expansion of judicial review of arbitral awards "would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts").

Even where enhanced judicial review is an option, the hydraulic effect of the U.S. legal culture will be such that there will be a proliferation of expanded judicial review clauses that will significantly increase the costs of dispute resolution and embroil the courts in complicated issues on review. The courts will be forced to review a large number of arbitral awards in the abstract, often against the backdrop of unfamiliar rules and procedures which, by definition, deviate from the norms of federal practice. In many cases, the courts will have to reconstruct the arbitrator's findings of fact and legal reasoning made in proceedings that may have taken some time before.

A stark example of the burden placed upon a court by party-driven judicial review of arbitral awards is illustrated by *Kyocera Corp. v. Prudential-Bache T Services*, 341 F.3d 987 (9th Cir. 2003), where the district court was forced to review the case "thirteen years after the arbitration was initiated and three years after the Ninth Circuit directed the district court to apply expanded review." Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 191-92 (citing *Lapine Tech. Corp. v Kyocera Corp.*, Nos. C-87-20316 WAI, C-91-20159 WAI, 2000 WL 765556, at *3-13 (N.D. Cal. Apr. 4, 2000) (showing the district court's painstaking rebuilding of the facts through a review of the arbitration panel's findings)). This is to say nothing of the increased time and cost in arbitration proceedings to document every submission and finding to anticipate and guard against the possibility of review.

B. This Court Has Not Allowed Parties To Dictate The Availability Or Standards Of Judicial Review, And Should Not Do So Here

This Court has generally rejected party-driven or privately-contracted attempts to confer jurisdiction on the courts to act in the absence of a statutory basis to do so. *See e.g., Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982) (stating that "no action of the parties can confer subject-matter jurisdiction upon a federal court"). The courts of appeals have followed this position by holding that "action by the court can be neither purchased nor parleyed by the parties," and that private stipulation that judicial review should occur "cannot bind the court." *Clarendon, Ltd., v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991); *U.S. Aluminum Corp./Texas v. Alumax, Inc.*, 831 F.2d 878, 879-80 (9th Cir. 1987) (stating that federal courts are not bound by private parties' "stipulations as to the substance of law"), *cert. denied*, 488 U.S. 822 (1988); *Khouzam v. Ashcroft*, 361 F.3d 161, 167 (2d Cir. 2004) ("Action by [a] court is not a subject that the parties may negotiate among themselves, and a judicial act

... is normally taken only when the appellate court determines that such action is warranted on the merits.").

There is no reason why a different principle should apply here. As the Court of Appeals for the Seventh Circuit has held, "federal jurisdiction [over arbitral awards] cannot be created by contract." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (Posner, J.); *see also Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 65-66 (2d Cir. 2003) ("[P]rivate parties may not dictate to a federal court when to enter a judgment enforcing an arbitration award. *Judicial standards of review*, like judicial precedents, *are not the property of private litigants . . . judicial review is not a creature of contract*, and the authority of a federal court to review an arbitration award . . . *does not derive from a private agreement.*") (emphasis added). This Court should not permit the Petitioner to confer jurisdiction on the courts to review arbitration awards where the FAA provides no basis for such jurisdiction.

IV. ALLOWING PARTIES TO CONTRACT FOR REVIEW FOR ERRORS OF LAW WILL INTRODUCE AN UNPRECEDENTED LEVEL OF REVIEW THAT WILL BE DIFFICULT TO COMPARTMENTALIZE AND IMPOSSIBLE TO LIMIT

Permitting parties to define the scope of judicial review will force the courts into reviewing awards on a potentially wide variety of issues. If parties are permitted to agree on judicial review of issues of law, the same principle would logically extend to allow them to provide for other forms of review such as reviewing findings of fact or evidentiary issues (where the rules of evidence apply). Nor would there be anything to prevent parties from stipulating specific standards for judicial review or even for different standards or review for different issues. Justin Edwab, *A Colorado Court of Appeals Declines to Adopt the Common Law Standards of Manifest Disregard of the Law for Vacating Arbitral Awards*, 4 J. Am. Arb. 193, 197 (2005) ("[I]f the

judiciary was able to create its own grounds for judicial review, the effectiveness and legitimacy of arbitration would diminish. . . adoption of this standard would create a slippery slope for additional judicially-created grounds for review.") (internal quotations omitted) (citing *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 65-66 (Colo. App. 2004); Pelagia Ivanova, *Note: Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards under the New York Convention*, 83 B.U.L. Rev. 899, 901-02 (2003) ("[T]hough judicial review is certainly necessary and important to international arbitration, limits to judicial discretion are no less crucial to prevent abuse. The argument for such limits is even stronger where a treaty explicitly restricts judicial discretion . . . recent decisions could lead courts down a slippery slope, undermining the pro-enforcement purpose of the New York Convention and pushing international arbitration of business disputes into obscurity.") As one noted commentator has observed, this principle "[c]ould [even] justify [party-driven] judicial review of arbitral awards beyond the limits prescribed for judicial review of court decisions." Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 151 (1997); *see also First Options of Chicago, Inc.*, 514 U.S. at 948 ("For one thing, it is undesirable to make the law more complicated by proliferating review standards without good reasons.").

Even if this Court were to accept party-stipulated review for errors of law only, as the Petitioner proposes, this would still not affirmatively limit the scope of review. The difficulties in distinguishing between questions of law and fact have been well documented. *See* Taner Dedezade, *Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1196 – Appeals on A Question of Law*, Int'l A.L.R. 2006, 9(2), 56-67 at 66 (2006) (noting the "multitude of case law" under the English Arbitration Act 1996, which, as discussed below, provides for judicial review of arbitral legal issues, "in which the courts have had to

consider whether an issue falls into the category of an error of law or simply a finding of fact"). Even in review proceedings ostensibly limited to issues of law, the courts may still end up reviewing both the law and the facts. Unless arbitration awards are rendered impervious to judicial scrutiny, save in the narrow circumstances permitted by the FAA, the arbitration process will end up deciding none of the issues submitted to it and will be little more than an expensive and time-consuming prelude to litigation.

V. LEADING ARBITRATION JURISDICTIONS TEND TO LIMIT JUDICIAL REVIEW OF ARBITRAL AWARDS AND PERMITTING JUDICIAL REVIEW WILL MAKE THE UNITED STATES A LESS ATTRACTIVE FORUM FOR ARBITRATION

A. The International Trend Leans Towards Limiting Judicial Review Of Awards

The international trend is toward limited judicial review. International model arbitration legislation and many of the key centers for international arbitration have, in the last two decades, increasingly moved toward regimes providing for reduced judicial review in international arbitrations.

1. The UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") was drafted by the United Nations Commission on International Trade Law in 1985 to serve as a model upon which to base national arbitration laws relating to international commercial arbitration. The UNCITRAL Model Law, which has been adopted or served as the basis for fifty jurisdictions in addition to six U.S. states and Bermuda,[5] evidences the international trend towards

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[5] According to the UNCITRAL web site, http://www.uncitral.org/, the following jurisdictions have adopted the law: Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005),

restricting judicial review by enunciating a general policy of exceedingly limited judicial intervention in Article 5, which expressly mandates that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law." United Nations Commission on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration*, Art. 5 (1994). The UNCITRAL Model Law explicitly enumerates the limited grounds upon which a party may seek to set aside an arbitral award and the grounds for refusing to recognize or enforce an award, in Articles 34 and 36, respectively, neither of which provides for review of errors of law.[6] The result of the limited judicial review provided for in Articles 34 and 36 and the exclusionary principle of judicial intervention in Article 5 is that the parties are not permitted to expand the judicial review of an arbitral award under the UNCITRAL Model Law. *See* Vikram Raghavan, *Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on some US Developments*, 15 J. of Int'l Arb. 103, 133 (1998) ("heightened judicial review would be clearly impermissible under the UNCITRAL Model Law because of express provisions that rein in the courts").

Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia, and Zimbabwe.

6 The grounds enumerated in the UNCITRAL Model Law mirror those found in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2. France

France, where the International Court of Arbitration* is headquartered, is by many measures the leading international arbitration forum, in part, because it has established a policy of limited judicial intrusion into arbitration proceedings and awards. French statutory and jurisprudential authorities have indicated a clear intent to maintain a narrow scope of judicial review in order to aid in the enforcement of arbitral awards, meaning that parties' freedom of contract does not include the right to create new grounds that are not provided for within the explicit text of the applicable statutes. *See* Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 Brook. J. Int'l L. 313, 344-45 (2003) (noting that a reviewing court will not consider non-statutory grounds of setting aside arbitral awards that are suggested by the parties because both decrees governing judicial review of arbitral awards contain specific and exclusive grounds).

French decrees of 1980 and 1981 promulgated modern statutory regulations pertaining, respectively, to domestic arbitration (Articles 1442-1491 of the New Code of Civil Procedure) and international arbitration (Articles 1492-1507 of the New Code of Civil Procedure). Nouveau Code de Procedure Civile [N.C.P.C], Livre IV (1981) (Fr.) (translated in Yves Derains and Rosabel E. Goodman-Everard, *France*, Annex I-II, Suppl. 26, February 1998, in *International Handbook on Commercial Arbitration* (Jan Paulsson ed. 1998)). Article 1484 of the New Code of Civil Procedure establishes six grounds available to set aside a domestic award, whereas Article 1502 of the New Code of Civil Procedure enumerates five grounds upon which to set aside an international award. Neither statute permits the parties to derogate from the enumerated grounds or expand the judicial review of an arbitral award to include errors of law. In fact, both statutes are drafted in a manner to render the enumerated list of appealable grounds exhaustive ("[appeal is] only available on the following grounds").

Nouveau Code de Procedure Civile [N.C.P.C], Livre IV (1981) (France) (translated in Yves Derains and Rosabel E. Goodman-Everard, *France*, Annex I-II, Suppl. 26, February 1998, in *International Handbook on Commercial Arbitration* (Jan Paulsson ed. 1998); *see generally* Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 Am. Rev. Int'l Arb. 215, 217 (1999) ("It has been a constant under French law that the grounds enumerated in the statute cannot be extended, nor reduced; they are exclusive.").

The French pro-arbitration policy allows for an exceedingly limited judicial review of arbitral awards, creating a system in which arbitral decisions are afforded extreme deference. The Cour de Cassation has ruled that parties may not contractually expand the means of recourse available under French law. *Société Buzzichelli Holding c. Hennion*, Cour de cassation [Cass. 1e civ.] [Court of Cassation.] Apr. 6, 1994 (Fr.); *see* Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 Am. Rev. Int'l Arb. 215, 220 (1999) (translating the *Buzzichelli* decision as stating "the international and domestic legal framework on arbitration, provides among others the means of recourse against the arbitral award which the parties are not allowed to modify even by a specific agreement"). Thus far, the French court has not analyzed whether an arbitration clause that allows for expanded judicial review for errors of law is permissible based on the parties' freedom of contract. However, given the French policy of limited judicial intervention in arbitral proceedings or awards, it is likely the French court would refuse to extend judicial review beyond the scope of Articles 1484 and 1502 of the New Code of Civil Procedure.

3. Switzerland

Switzerland has also narrowed the scope of judicial review under its arbitration laws. Article 190 of the new Swiss Federal Code on Private International Law (the CPIL) enacted in 1987 adopted fewer grounds for setting

aside an award than did the previous law, and made clear that this list was exhaustive. *See* Pierre Lalive, *The New Swiss Law on International Arbitration*, 4 Arb. Int'l 2, 15 (1988) (noting the shorter list of grounds for setting aside an award, five instead of nine, and that the list is "'exhaustive' and as precise as reasonably possible, in order to increase foreseeability and legal certainty"); Swiss Federal Code on Private International Law (Switz.) *translated in* Robert Briner, *Switzerland*, in *International Handbook on Commercial Arbitration* 33 (J. Paulsson ed. 1998) (listing the five exclusive grounds for setting aside an award). The revised Swiss law also provides for exclusion agreements. Several commentators have noted that "a main purpose of the new legislation was to restrict the possibilities of appeals against arbitral awards and to simplify and accelerate the procedure for setting them aside." Pierre Lalive, *The New Swiss Law on International Arbitration*, 4 Arb. Int'l 2, 15 (1988).

4. The United Kingdom

The only major "arbitration-friendly" jurisdiction in which there is limited judicial review is the United Kingdom, which, under the Arbitration Act 1996, provides for judicial review of questions of law when the contract is governed by English law. Arbitration Act, 1996, c. 23 (Eng.) (produced in V.V. Veeder QC, *England*, Annex I, Supp. 23, in *International Handbook on Commercial Arbitration* 33 (J. Paulsson ed. 1997)). But this limited form of review actually marked a historic shift away from much more sweeping judicial intervention. Until 1996, the right of appeal on substantive points of law had been essentially automatic. John Tackaberry & Arthur Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* 374-82 (4th ed. 2003) (discussing how the 1996 revision narrowed judicial review). The ease with which U.K. arbitration awards could previously be appealed compromised the finality of disputes, and as a result, parties began shopping elsewhere for international arbitration forums. Realizing that arbitration parties did not want

their dispute resolution procedures to mirror the long, drawn-out process of litigation, the United Kingdom revised its arbitration laws to provide for a more narrow review of awards. *See* Arbitration Act, 1996, c. 23, § 69 (Eng.) (produced in V.V. Veeder QC, *England*, Annex I, Supp. 23, in *International Handbook on Commercial Arbitration* 33 (J. Paulsson ed. 1997)) (Subsection (1) of Section 69 states "a party to arbitral proceedings may. . . appeal to the court on a question of law arising out of an award made in the proceedings.")

While the default rules still provide for judicial review of errors of law, parties are permitted to forego such review through agreement in advance. *Id.* (Subsection (1) of Section 69 further states that "an agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction."); *accord Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] 3 All ER 789, 801-02 (Eng.) (noting in the context of review under Section 68 that "[a] major purpose of the [Act] was to reduce drastically the extent of intervention of courts in the arbitral process"). Furthermore, even when such an agreement is not reached, judicial review of awards is only permitted through the permission of both parties or leave of the court, which is only given under four narrowly defined circumstances. Arbitration Act, 1996, c. 23, § 69 at (3)(a) (determination will substantially affect the rights of one or more of the parties); (3)(b) (the arbitral tribunal was asked to determine the question); (3)(c) (the arbitral award is obviously wrong, or open to serious doubt, because the question is one of public importance); and (3)(d) (it is proper and just for the court to determine the question).

The legislative history behind this change in U.K. law, as interpreted by the English courts, clearly demonstrates an intent to meet the demand of arbitration parties by narrowing judicial review. During the House of Lords' debate on the Arbitration Act, Lord Fraser emphasized this purpose:

> We started from the principle that if parties have chosen arbitration rather than the courts to resolve their dispute, this decision must be respected. We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward or where there has been a manifest injustice. It is thus a deregulatory measure in that we are freeing up the process from unwarranted reference to the courts or unwanted interference by them. Intervention by the courts slows down the whole process, which inevitably adds to costs.

568 Parl. Deb., H.L. (5th Ser.) (1996) 761-62. During the same debate, Lord Hacking recognized that prior to these reforms, "it was deemed to be an act of professional negligence . . . to include in a contract an English arbitration clause," and voiced his belief that these changes, most prominently the narrowing of judicial review, would cause parties to develop a more favorable regard for the English arbitration system. *Id.* at 769.[7]

The English experience is thus part of a historic shift away from extensive judicial review, a development that

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7 Thus far, the results prove Lord Hacking to be correct. Since the United Kingdom changed its arbitration laws to significantly narrow the scope of judicial review, it has enjoyed a substantial increase in the amount of international arbitration proceedings taking place within its jurisdiction. *See* Robert Rice, *New Light on an Old Myth, The Financial Times (London)*, Dec. 3, 1996, at 16 (quoting Michael Lee, a litigator with Norton Rose, the City solicitors, as stating that "there has been a steady increase in the amount of international arbitration coming into London as people recognise [sic] that our system is not as time-wasting and costly as in the past"). This increase in international arbitration proceedings is due to the U.K.'s efforts to bring its laws in line with the demands of international arbitration parties. As Lord Fraser recognized, "arbitration is highly mobile in an international sense. A number of other countries have been making efforts to make their legislation more accessible to the business user. [The U.K.] must do the same if [it is] to safeguard the future competitiveness of London as a world arbitration centre." 568 Parl. Deb., H.L. (5th Ser.) (1996) 761.

occurred in the United States decades ago.[8] It is limited to questions of English law, while the Petitioner's position here (or the principle it espouses) would embroil U.S. courts in the review of legal issues under any substantive body of law, as well as questions of fact and procedure. The English legal system, unlike the U.S. system generally, provides that the losing party pays the other party's legal fees, a feature that has a profound effect on both the nature and volume of litigation, including the review of arbitral awards. Despite a shared common-law system, the English and U.S. legal cultures have significant differences, reflected in a much different view, over the last eight decades, of the role of courts in arbitration, and as to which party bears the costs of unsuccessful litigation.

B. Allowing For Expanded Judicial Review Will Make The U.S. A Less Attractive Forum For International Arbitration

American businesses conducting international business rely heavily on international commercial arbitration to resolve disputes. U.S. parties are among the largest single users of ICC arbitration services. U.S. cities are also among the top venues in the world for international arbitration. The latter is in part due to the fact that the U.S. legal system is perceived as being supportive of international arbitration. Awards are viewed as relatively easy to enforce, and courts are viewed as having a generally non-interventionist approach to arbitrations that recognizes the importance of finality. However, the relatively positive views of the U.S. arbitration system are in contrast with the negative perceptions held by foreign investors and

[8] As Professor Macneil observes, the Illinois Statute was based on the existing English arbitration law of the time, which provided for sweeping judicial review, unlike the New York Act. *American Arbitration Law* at 37 ("Like the 1917 Illinois statute, the English act contained an extremely important provision allowing arbitrators at any stage to put questions of law to the court, and empowering the court to direct the arbitrators to do so. The New York act, in contrast, had no such provision and left intact the Code of Civil Procedure provisions for merely limited judicial review.") (footnotes omitted).

businesses of the U.S. legal system generally. While due in part to significant differences in national and legal cultures, the U.S. legal system is viewed (unfairly or not) as excessively litigious, expensive, prone to frighteningly high judgments, and generally unpredictable. Thus, the U.S. has become an acceptable jurisdiction for international arbitrations in large measure in spite of foreign perceptions of its legal system.

Although U.S. businesses regularly participate in many international arbitrations abroad, the option of having international arbitrations in the U.S. is important to U.S. companies engaged in international commerce. Accordingly, maintaining the perceptions of the U.S. as a friendly forum for arbitration is important to international businesses in the U.S. If the U.S. legal environment were perceived to be more interventionist—in other words, if litigation became (or could be) an important component of arbitral proceedings—the negative perceptions of the U.S. legal system would affect the parties' perceptions of international arbitrations in the United States. *See* Christopher Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 Am. Rev. Int'l Arb. 451, 458 (2000) ("International arbitration proceedings are sufficiently mobile that if a national arbitration law is seen as unfavorable, parties can choose a different situs in future agreements to arbitrate.").

Any step toward increased scrutiny of awards would make the United States a less attractive forum for arbitration. "International merchants often prefer arbitration to litigation, *inter alia*, because arbitration is perceived as a faster, less expensive, more flexible, and more confidential means of dispute resolution." Joseph Lookofsky & Ketilbjorn Hertz, *Transnational Litigation and Commercial Arbitration* 756 (2d ed. 2003). If expanded review provisions should become pervasive, due to the ability of one party to impose them on others, international and U.S. businesses will begin to perceive arbitrations seated in the U.S. as merely a preliminary step to prolonged

and costly litigation in the U.S. courts—and will be less likely to choose the U.S. as a seat for arbitrations. The fact that enhanced judicial review is "optional" will not entirely offset the perception that arbitration has become more litigious in the United States. Foreign companies might also understandably wonder how far that trend will go in the wake of a decision by this Court allowing increased judicial intervention. Companies without large legal departments are likely to conclude that the simpler approach is, whenever possible, to insist on arbitration outside of the United States rather than run the risk that a particular arbitration clause may land them in extensive ancillary court proceedings.

In short, providing for expanded review runs against current international trends. International businesses, including international businesses in the U.S., prize finality and a judicial system that respects the integrity of the arbitral process. *See* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 147 (1997) ("One of the inestimable advantages of arbitration is that it provides for adjudication of disputes in a single instance. . . . Obtaining a resolution of a dispute under such circumstances in a speedy and efficient manner provides a compelling reason for limiting the scope of judicial review . . ."). Moving against this current trend, and engaging in dangerous tinkering with core arbitration principles, will tend to make the U.S. a less desirable place for international arbitration and inevitably make a reliable and efficient system of international arbitration less accessible and more expensive to international businesses in the U.S.

CONCLUSION

For these reasons, this Court should reject Petitioner's argument that parties to an arbitration agreement should be permitted to expand judicial review of arbitral awards beyond the specific grounds set out in the FAA for setting aside and vacating an arbitral award.

Respectfully submitted,

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